CHRONOLOGICAL DIRECTORY OF PUBLISHED OPINIONS, ORDERS AND JUDGMENTS, AND UNPUBLISHED OPINIONS ISSUED BY THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

1. ***In re Jeys*, 202 B.R. 153 (10th Cir. BAP 1996) (per curiam) (before Pusateri, Rose, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

   The Bankruptcy Appellate Panel, a non-Article III court, is not a "court of the United States" and, therefore, lacks authority under **28 U.S.C. § 1915(a)** to grant leave to appeal *in forma pauperis*. Accordingly, the debtor's motion for leave to proceed *in forma pauperis* was DENIED.

2. ***In re Vista Foods U.S.A., Inc.*, 202 B.R. 499 (10th Cir. BAP 1996) (per curiam) (before Pusateri, Rose, & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

   A bankruptcy court's order converting a Chapter 11 case to a case under Chapter 7 is a "final order" pursuant to **28 U.S.C. § 158(a)(1)**. Accordingly, a motion for leave to appeal was DENIED as such leave is necessary only when an appeal is from an interlocutory order or decree.

3. ***Lucero v. Green Tree Fin. Servicing Corp. (In re Lucero)*, 203 B.R. 322 (10th Cir. BAP 1996) (Bohanon, J.) (before Bohanon, Pearson, & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico, *reported at* 199 B.R. 742).**

   A bankruptcy court judgment, avoiding a lien on a mobile home which had become affixed to real property, was REVERSED. The Chapter 13 trustee could not avoid the secured creditor's lien under **11 U.S.C. § 544(a)(1) or (2)** because **U.C.C. § 9-313(4)(d)** allows a security interest in fixtures to be perfected by any method permitted by the Commercial Code. Since the creditor had perfected its lien with the New Mexico Motor Vehicle Division, its lien was perfected under § 9-313(4)(d).

   The creditor's lien was also not avoidable by the Chapter 13 trustee under **11 U.S.C. § 544(a)(3)** because that section expressly states that a trustee does not have the rights of a bona fide purchaser with respect to fixtures.

4. ***Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764 (10th Cir. BAP 1997) (Clark, J.) (before McFeeley, C.J., and Pusateri & Clark, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

   A bankruptcy court order denying a motion for remand of a state court action was REVERSED and REMANDED. The Court's appellate jurisdiction is not barred under

28 U.S.C. §§ 1334(c) or 1452(b), and order of the bankruptcy court denying remand was a "final order" under the collateral order doctrine or an appealable interlocutory order under **28 U.S.C. § 158(a)(3)**.

The bankruptcy court's jurisdiction over the state court action was at most "related to" the debtor's Chapter 11 case under **28 U.S.C. § 157**. The bankruptcy court was required to abstain from hearing the state court action under **28 U.S.C. § 1334(c)(2)**.

The appellant's allegations of bias against bankruptcy court judge were unsupported by the record, and were potentially sanctionable under **Fed. R. App. P. 38**.

5. ***In re Rivermeadows Assocs., Ltd.*, 205 B.R. 264 (10th Cir. BAP 1997) (Pearson, J.) (before Pearson, Boulden, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order dismissing an appeal for lack of prosecution pursuant to a local rule authorizing it to do so was AFFIRMED. A district court may properly delegate to a bankruptcy court the duty of monitoring compliance with federal and local rules governing appeals, including the power to dismiss an appeal which is not timely prosecuted. Although a bankruptcy court lacks jurisdiction over issues appealed, where a local rule authorizes it to dismiss an appeal for lack of prosecution, it may do so.

6. ***In re Kopexa Realty Venture Co.*, 1997 Bankr. LEXIS 2345, BAP No. KS-96-45 (10th Cir. BAP filed Feb. 28, 1997) (Boulden, J.) (before McFeeley, C.J., and Bohanon & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

The appellants' failure to obtain a stay pending appeal of a bankruptcy court order approving a sale of substantially all of the debtor's assets rendered the appeal of the sale order moot under **11 U.S.C. § 363(m)**. The appellees' Motion to Dismiss Appeal as Moot was GRANTED and the appeal was DISMISSED.

7. ***In re Rivermeadows Assocs., Ltd.*, BAP No. WY-97-011 (10th Cir. BAP filed Mar. 19, 1997) (before McFeeley, C.J., and Bohanon & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

Elections to have an appeal heard in district court, which were filed after the filing of entry of appearances and certificates of interested parties, were GRANTED and the appeal was transferred to the district court. **10th Cir. BAP L.R. 8001-1(e)**, which provides that parties filing documents prior to 30 days after service of notice of appeal waive the 30-day period to elect to have appeal heard in district court, does not apply when a party files documents required by either the Local Rules of the Bankruptcy Appellate Panel or by the Federal Rules of Bankruptcy Procedure.

8. ***In re Furst*, 206 B.R. 979 (10th Cir. BAP 1997) (per curiam) (before Bohanon,**

Pearson, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).

The Court DISMISSED an appeal for lack of jurisdiction because the appellant filed an untimely notice of appeal pursuant to **Fed. R. Bankr. P. 8002**. The fact that a holiday occurred during the period for filing the appeal did not affect the calculation of the 10-day period under **Fed. R. Bankr. P. 9006(a)**. The **doctrine of unique circumstances** did not apply where the *pro se* appellant allegedly received erroneous advice from the bankruptcy court clerk of court's office regarding the time for filing the appeal.

9. ***In re Vista Foods U.S.A., Inc.*, 226 B.R. 284, 1997 WL 837774, BAP No. WO-96-37 (10th Cir. BAP filed Apr. 3, 1997) (per curiam) (before Clark, Boulden, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order converting a Chapter 11 case to a case under Chapter 7 was AFFIRMED because the court did not abuse its broad discretion under **11 U.S.C. § 1112(b)(1), (2) & (3)**. Discussion of the burden of proof applicable to hearings under § 1112(b).

10. ***Straight v. First Interstate Bank of Commerce (In re Straight)*, 207 B.R. 217 (10th Cir. BAP 1997) (Pusateri, J.) (before McFeeley, C.J., and Pusateri & Clark, JJ.) (Appeals from the United States Bankruptcy Court for the District of Wyoming, *reported at* 200 B.R. 923 (1996)), *appeal dismissed*, No. 97-8037 (10th Cir. filed May 12, 1997).**

A bankruptcy court judgment holding that the defendant-bank did not have a security interest in an account receivable and avoiding a payment made to the bank during the 90-days prior to the filing of the debtors' bankruptcy case under **11 U.S.C. § 547(b)** was AFFIRMED.

The bankruptcy court's judgment that a tax lien was not avoidable under **11 U.S.C. § 545(2)** was AFFIRMED. Discussion of the interplay between **26 U.S.C. § 6323(b)** and **11 U.S.C. §§ 522(c) & 545(2).**

11. ***In re Cozad*, 208 B.R. 495 (10th Cir. BAP 1997) (Cornish, J.) (before Bohanon, Robinson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

In calculating impairment to an exemption under **11 U.S.C. § 522(f)(2)(A),** all liens on property must be added to the exemption that the debtor would be entitled to if there were no liens on the property, and that sum should be deducted from the value that the debtor's interest in the property would have in the absence of any liens. A lien under **11 U.S.C. § 101(37)** includes consensual and judgment liens. Thus, a bankruptcy court's order avoiding a creditor's lien under § 522(f) was AFFIRMED because the lien

impaired the debtor's exemption where the total amount of the liens and the debtor's exemption exceeded the debtor's one-half interest in the property. Fair market value was used to determine the value of the debtor's property.

12. ***Bank of Western Okla. v. Cantrell (In re Cantrell)*, 208 B.R. 498 (10th Cir. BAP 1997) (Pusateri, J.) (before Pusateri, Clark, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

The bankruptcy court's judgment finding a secured creditor's debt to be nondischargeable under **11 U.S.C. § 523(a)(6)** was AFFIRMED. The "willful" requirement under § 523(a)(6) requires a showing of conduct that is volitional and deliberate and over which the debtor exercises meaningful control, as opposed to unintentional or accidental conduct. No intent to injure is required to be shown. The "malicious" requirement under § 523(a)(6) can be established by showing that a debtor had knowledge of a secured creditor's rights and, without justification or excuse, proceeded to act in violation of those rights. It must be at least reasonably foreseeable that the debtor's acts would injure the creditor. The bankruptcy court is not required to fix the amount of the debt which it has determined to be nondischargeable.

13. ***In re Rocky Mountain Refractories*, 208 B.R. 709 (10th Cir. BAP 1997) (Robinson, J.) (Bohanon, J., dissenting) (before Bohanon, Robinson, & Cornish, JJ.)(Appeal from the United States Bankruptcy Court for the District of Utah, *reported at* 205 B.R. 307 (1996)).**

A bankruptcy court judgment requiring the payment of interest that had accrued on certain administrative expense claims during the debtor's Chapter 11 case at the same priority as underlying administrative expense claims after case was converted to Chapter 7 was AFFIRMED. Interest that accrues on Chapter 11 administrative expenses should not be subordinated in priority under the plain language of **11 U.S.C. § 726(a)(5).** Section 726(a)(5) does not apply to Chapter 11 claims that are fixed at the time of conversion.

14. ***In re Hatcher*, 208 B.R. 959 (10th Cir. BAP 1997) (Boulden, J.) (before McFeeley, C.J., and Pearson & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma, *reported at* 202 B.R. 626(1996)), *aff'd without opinion*, 133 F.3d 932 (10th Cir. 1998).**

Appeal from two orders: (1) order disallowing claim for postpetition attorney's fees; and (2) order denying confirmation of plan, which included ruling that 60-month Chapter 13 plan was not *per se* unreasonable.

Regarding (1), the bankruptcy court order disallowing postpetition attorney's fees was AFFIRMED. Neither **11 U.S.C. § 1322(b)(2)** nor *Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993) allowed such fees where contract between the parties expressly limited the allowance of fees, and attorney had already been allowed maximum amount of fees

provided for under the contract. If **11 U.S.C. § 506(b)** applies in light of the interpretation of § 1322(b)(2) in *Nobelman*, the fees were not allowable because the contract prohibited further collection of fees. The fees were also not allowable under **11 U.S.C. § 1325(a)(5)(B)(ii)** and *Rake v. Wade*, 508 U.S. 464 (1993).

Regarding (2), the Court declined to review whether the 60-month Chapter 13 plan was *per se* unreasonable due to lack of appellate jurisdiction. An order denying confirmation of a Chapter 13 plan is not a "final order" as required under **28 U.S.C. § 158(a)**. Although an order confirming a plan was subsequently entered prior to the decision on appeal, the creditor failed to appeal that order. Discussion of *Lewis v. B.F. Goodrich Co.*, 850 F.2d 641 (10th Cir. 1988) (en banc).

14a. ***Dawson v. Unruh (In re Dawson)*, 209 B.R. 246 (10th Cir. BAP 1997) (Robinson, J.) (before Pusateri, Boulden, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court order determining a debt to be nondischargeable under **11 U.S.C. § 523(a)(3)(A)** was AFFIRMED where the debtor did not list the creditor in his schedules, the bar date for filing proofs of claim had expired, and the creditor did not have knowledge of the Chapter 7 case. Discussion of appellate jurisdiction under **28 U.S.C. § 158(a)** and *Lewis v. B.F. Goodrich Co.*, 850 F.2d 641 (10th Cir. 1988) (en banc).

15. ***In re Rambo*, 209 B.R. 527 (10th Cir. BAP) (Pearson, J.) (before McFeeley, C.J., and Pearson & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *aff'd without opinion*, 132 F.3d 43 (10th Cir. 1997).**

A bankruptcy court order sanctioning an attorney under **Fed. R. Bank. P. 9011** was AFFIRMED because the attorney failed to provide an adequate record for appellate review.

Discussion of appellate jurisdiction: (1) although the Chapter 13 case was dismissed, the Court had jurisdiction over the appeal because the issue on appeal was not dependent on the existence of the underlying bankruptcy case; (2) the dismissal of a previous appeal of the sanction order because it was interlocutory did not bar the appeal of same order when it became final.

16. ***In re Key*, 209 B.R. 737 (10th Cir. BAP 1997) (Bohanon, J.) (before Bohanon, Boulden, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

11 U.S.C. § 303 and Fed. R. Bankr. P. 1013 require the bankruptcy court to enter an order for relief if the debtor does not timely respond to an involuntary petition. Thus, the bankruptcy court's order dismissing an involuntary petition which was not properly pleaded was REVERSED.

17. ***Harris v. Beneficial Okla., Inc. (In re Harris),*** **209 B.R. 990 (10th Cir. BAP 1997) (Clark, J.) (Matheson, J., dissenting) (before Pusateri, Clark, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order denying the defendant's motion for summary judgment was AFFIRMED, but an order granting the plaintiff's cross-motion was REVERSED, and the case was REMANDED for further proceedings. Appellate jurisdiction and standards of review applied in considering **Fed. R. Civ. P. 56(c)** and **Fed. R. Bankr. P. 56** orders are discussed, as are the applicable law and requirements of proof.

18. ***In re Gantz,*** **209 B.R. 999 (10th Cir. BAP 1997) (Pearson, J.) (before McFeeley, C.J., and Pearson & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order barring an attorney from collecting fees which had been disallowed against the debtor was AFFIRMED. After the debtor concluded payments under his Chapter 13 plan and received a discharge, his attorney attempted to collect fees which the bankruptcy court had disallowed. The bankruptcy court ordered the attorney to stop his collection efforts because the debt had been discharged. Although there was no prepetition debt to discharge under **11 U.S.C. § 1328**, the bankruptcy court was affirmed because the debtor was not liable for the fees as they were never allowed under **11 U.S.C. § 330**.

19. ***In re Hunt,*** **226 B.R. 284, 1997 WL 840832, BAP No. UT-97-006 (10th Cir. BAP filed July 16, 1997) (Pusateri, J.) (before Pusateri, Bohanon, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah),** ***aff'd without opinion,*** **153 F.3d 727 (10th Cir. 1998).**

A bankruptcy court order refusing to reopen a case was AFFIRMED as there was no way from appellate record to determine if bankruptcy court had abused its discretion. The order appealed provided no information about the bankruptcy court's rationale for refusing to reopen case, and the appellant had not provided a transcript of hearing. **10th Cir. BAP L.R. 8009-1(e)** requires parties to include transcripts necessary for review in light of the standard of review to be applied to the issues before the court.

20. ***In re Love,*** **226 B.R. 284, 1997 WL 837795, BAP No. WY-97-001 (10th Cir. BAP filed July 17, 1997) (Cornish, J.) (before McFeeley, C.J., and Pearson & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order compelling the Chapter 7 debtor to cooperate with the trustee by obtaining appraisals and providing information was AFFIRMED. **11 U.S.C. § 521(3)** and **(4)** require the debtor to cooperate with the trustee by supplying copies of motor vehicle titles and obtaining free appraisals of the vehicles.

21. ***In re Bechtoldt*, 210 B.R. 599 (10th Cir. BAP 1997) (Matheson, J.) (before Bohanon, Cornish, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order denying the Chapter 13 trustee's objection to the debtor's claim of **exemption** in tools of trade under Wyoming law, which was the debtor's secondary trade, was AFFIRMED.

22. ***In re S. Star Foods, Inc.*, 210 B.R. 838 (10th Cir. BAP 1997) (McFeeley, C.J.) (before McFeeley, C.J., and Pearson & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma, *reported at* 201 B.R. 291 (1996)), *aff'd,* 144 F.3d 712 (10th Cir. 1998), *cert. denied*, 525 U.S. 978 (1998).**

A bankruptcy court order holding that unpaid workers' compensation premiums was not a claim entitled to priority as a "contribution to an employee benefit plan" under **11 U.S.C. § 507(a)(4)** was AFFIRMED.

23. ***In re Smitty's Truck Stop, Inc.*, 210 B.R. 844 (10th Cir. BAP 1997) (McFeeley, C.J.) (before McFeeley, C.J., and Pearson & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order requiring the debtor's attorney to disgorge all previously paid compensation and denying all future compensation from the debtor's estate was AFFIRMED. The attorney's failure to comply with the mandatory disclosure requirements of **11 U.S.C. §§ 327 & 329** and **Fed. R. Bankr. P. 2014(a) & 2016(b)**, first by providing no information regarding the existence or source of his retainer, and then by providing incorrect and inconsistent information in employment pleadings and fee applications, warranted the bankruptcy court's order disgorging fees that had been paid and denying future fees. Negligence or inadvertence on the part of an attorney does not excuse compliance with § 329, and the bankruptcy court may deny or disgorge fees even in the absence of harm to the estate. Discussion of the fiduciary responsibilities of debtor's counsel.

24. ***In re Salina Speedway, Inc.*, 210 B.R. 851 (10th Cir. BAP 1997) (McFeeley, C.J.) (before McFeeley, C.J., and Clark & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma), *appeal dismissed,* No. 97-5119 (10th Cir. filed Dec. 17, 1997) .**

A bankruptcy court order denying post-confirmation United States trustee quarterly fees under **28 U.S.C. § 1930(a)(6)** was AFFIRMED. The amendment to § 1930(a)(6), which requires quarterly fees to be paid post-confirmation, applied where the Chapter 11 plan was confirmed after the amendment became effective. However, where the plan was confirmed and United States trustee did not object to the plan on the grounds that it did not provide for payment of quarterly fees, the trustee was barred under **11 U.S.C. § 1141** and **res judicata** from recovering such fees. Requiring the reorganized debtor to pay the

post-confirmation fees would impermissibly effect a plan modification which was prohibited under **11 U.S.C. § 1127(b)**. Additionally, the fees did not arise by operation of law inasmuch as the bankruptcy court determines their allowance at the time of confirmation under **11 U.S.C. § 1129(a)(12).**

25. ***Health Midwest Office Facilities Corp. v. Zipper (In re Zipper)*, 226 B.R. 284, 1997 WL 837784, BAP No. KS-97-025 (10th Cir. BAP filed Aug. 21, 1997) (Clark, J.) (before Clark, Bohanon, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

Appeal DISMISSED WITHOUT PREJUDICE because the orders appealed were not final as required by **28 U.S.C. § 158(a)(1)** as all causes of action regarding the proceeding had not been disposed of by the bankruptcy court. The Court also discussed the separate judgment requirement in **Fed. R. Bankr. P. 9021** and the requirements of a notice of appeal under **Fed. R. Bankr. P. 8001(a)**.

26. ***Stevens v. Stevens (In re Stevens)*, 226 B.R. 284, 1997 WL 837805, BAP No. WO-97-024 (10th Cir. BAP filed Aug. 22, 1997) (McFeeley, C.J.) (before McFeeley, C.J., and Pusateri & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

Appeal DISMISSED because the order denying summary judgment was not a final order as required by **28 U.S.C. § 158(a)(1)**.

27. ***Joseph v. Lindsey (In re Lindsey)*, 212 B.R. 373 (10th Cir. BAP 1997) (per curiam) (before Pusateri, Cornish, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

Appeal from a bankruptcy court order denying a request for a protective order was DISMISSED WITHOUT PREJUDICE because the order appealed was not final as required under **28 U.S.C. § 158(a)(1).** A party seeking to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order. The bankruptcy court's order also was not reviewable under the **collateral order doctrine** or as an appealable interlocutory order under **28 U.S.C. § 158(a)(3).**

28. ***In re White*, 212 B.R. 979 (10th Cir. BAP 1997) (Robinson, J.) (before Pusateri, Bohanon, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order (1) allowing a secured claim filed by the debtor's former spouse, and (2) disallowing in part and allowing in part the former spouse's unsecured priority claim was AFFIRMED.

The spouse's secured claim, based on her postpetition state court judgment in a divorce

proceeding which had been commenced prepetition, was not avoidable under **11 U.S.C. § 544**. While § 544 might operate to avoid a lien obtained in a divorce case commenced postpetition, it does not do so where the case was commenced prepetition. Under Wyoming law, when a divorce is commenced the spouses' respective property interests are vested, but subject to definition. When the state court entered its divorce decree, the former spouse obtained a lien and at no time prior could a hypothetical creditor have encumbered the property.

The bankruptcy court's conclusion that the state court's unsecured monetary award to the former spouse was "support" which was entitled to priority under **11 U.S.C. §507(a)(7)** was not clearly erroneous, and its legal conclusion that the portion of that award which accrued postpetition was not allowable under **11 U.S.C. § 502(b)(5)** was also correct under the express language of that section.

29. ***In re Watkins*, 226 B.R. 284, 1997 WL 840007, BAP No. WO-97-028 (10th Cir. BAP filed Sept. 25, 1997) (Pusateri, J.) (before Pusateri, Pearson, & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma)**.

A bankruptcy court order allowing the debtor's claimed exemptions in certain farming equipment as "tools of the trade" under Oklahoma law and avoiding a secured creditor's lien in such items under **11 U.S.C. § 522(f)(1)(B)(ii)** was AFFIRMED.

30. ***In re Double J Cattle Co.*, 226 B.R. 284, 1997 WL 837762, BAP No. WY-97-029 (10th Cir. BAP filed Oct. 24, 1997) (Boulden, J.) (Clark, J. dissenting) (before Clark, Boulden, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order denying a Chapter 12 debtor's attorney's request for payment of fees and expenses was REVERSED because the court failed to apply the standards set forth in **11 U.S.C. § 330(a)(1)(A) and (B) & (a)(4)(A)(ii)**.

31. ***In re Kopexa Realty Venture Co.*, 213 B.R. 1020 (10th Cir. BAP 1997) (Matheson, J.) (before Clark, Bohanon, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *appeal dismissed*, No. 97-3381 (10th Cir. filed February 26, 1998).**

A bankruptcy court order approving a proposed compromise and settlement over the objections of creditors was VACATED, and the matter was REMANDED to the bankruptcy court for further proceedings. **Fed. R. Bankr. P. 7052**, which is made applicable to contested matters under Fed. R. Bankr. P. 9014, requires the bankruptcy court to make specific factual findings. Because the bankruptcy court failed to make factual findings, there was nothing for the appellate court to review.

32. ***Redmond v. Fed. Deposit Ins. Corp. (In re Ramsay)*, 226 B.R. 284, 1997 WL 837769,**

BAP No. KS-97-007 (10th Cir. BAP filed Nov. 21, 1997) (per curiam) (before Clark, Bohanon, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).

A bankruptcy court order overruling an objection by the Chapter 7 trustee to a proof of claim filed by the Federal Deposit Insurance Corporation was AFFIRMED.

33. ***Antlers Roof-Truss & Builders Supply v. Storie (In re Storie)*, 216 B.R. 283 (10th Cir. BAP 1997) (Clark, J.) (before Clark, Robinson, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A bankruptcy court order determining that certain debts owed by the Chapter 7 debtors were dischargeable was REVERSED, and the case was REMANDED for further proceedings. The bankruptcy court erred in determining that "defalcation" under **11 U.S.C. § 523(a)(4)** requires some sort of moral dereliction or intentional wrong. Rather, "defalcation" is a fiduciary-debtor's failure to account for funds that have been entrusted to it due to any breach of a fiduciary duty, whether intentional, willful, reckless, or negligent. The fiduciary is also charged with knowledge of the law and its duties. The burden of proof under § 523(a)(4) is discussed. The case was remanded to the bankruptcy court to make findings of fact and conclusions of law as to whether the debtors were acting in a "fiduciary capacity" as required under § 523(a)(4).

34. ***In re Stewart*, 215 B.R. 456 (10th Cir. BAP 1997) (Robinson, J.) (before Clark, Robinson, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma, *reported at* 201 B.R. 996 (1996) and 204 B.R. 780 (1997)), *aff'd*, 175 F.3d 796 (10th Cir. 1999).**

Appeal of two bankruptcy court orders: (1) an order dismissing the Chapter 7 debtor's bankruptcy case under **11 U.S.C. § 707(b)**; and (2) an order declaring § 707(b) to be constitutional. Both orders were AFFIRMED.

The bankruptcy court did not err in: (1) allowing the United States trustee to commence a **11 U.S.C. § 707(b)** action based on the suggestion or request of a creditor; (2) determining that the debtor's case was a "substantial abuse" under a "totality of the circumstances" test; or (3) in finding that the debtor's debts, consisting primarily of student loans and inter-family loans, were "primarily consumer debts." Although student loan debts are not *per se* consumer debts under **11 U.S.C. § 101(8)**, if their primary purpose was for a personal, family or household purpose, such as maintaining a family's lifestyle in a particular manner, then they must be considered consumer debts under § 707(b). Debts are "primarily"consumer debts under § 707(b) if more than half the dollar amount owed is consumer debt.

The bankruptcy court also did not err in concluding that § 707(b) is not unconstitutional under the equal protection and due process guarantees of the United States Constitution, and it is not void for vagueness.

35. ***Holaday v. Seay (In re Seay)*, 215 B.R. 780 (10th Cir. BAP 1997) (Boulden, J.) (before Pusateri, Boulden, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

Appeal of two bankruptcy court judgments: (1) a judgment finding a debt to be dischargeable under **11 U.S.C. § 523(a)(4)**; and (2) a judgment finding that the debtor's discharge should not be denied under **11 U.S.C. §727(a)(2)(A) or (a)(4)(A)**. Both judgments were AFFIRMED.

A debtor does not act in a "fiduciary capacity" under § 523(a)(4) based on a common law fiduciary relationship between members of a joint venture. Since there was no written agreement or statute creating a fiduciary relationship, the debtor was not acting in a "fiduciary capacity" and his debt was not excepted from discharge under § 523(a)(4). Additionally, the creditor failed to prove the existence of a trust *res* as required under § 523(a)(4).

The bankruptcy court's findings that the debtor did not transfer property with an intent to defraud as required under § 727(a)(2)(A), and that he did not make a false oath related to a material fact as required under § 727(a)(4)(A), were not clearly erroneous.

36. ***The Employers Workers' Comp. Ass'n v. Kelley (In re Kelley)*, 215 B.R. 468 (10th Cir. BAP 1997) (Pusateri, J.) (before Pusateri, Boulden, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma), *appeal dismissed,* No. 98-5008 (10th Cir. filed Apr. 24, 1998).**

A bankruptcy court judgment determining that a debt was not excepted from discharge under **11 U.S.C. § 523(a)(4) and (6)** was REVERSED in part, and the case was REMANDED for further proceedings. The debtor, an insurance agent who sold memberships in an employers' self-insurance group, used insurance premiums instead of remitting them to the plaintiff-insurance group. After the debtor filed Chapter 7, the insurance group sought to have the debt excepted from discharge under § 523(a)(4) and (6) based on defalcation while acting in a fiduciary capacity, embezzlement or conversion. The bankruptcy court rejected the group's claims finding that the debtor was not acting in a fiduciary capacity, and that the elements of embezzlement and conversion had not been met. While the bankruptcy court's conclusion was correct, it failed to consider an Oklahoma statute which might have created the necessary fiduciary relationship. Accordingly, the bankruptcy court's judgement was reversed in part and the case was remanded to the bankruptcy court to determine whether the statute applied.

37. ***In re Sims*, 226 B.R. 284, 1997 WL 854793, BAP No. NM-97-022 (10th Cir. BAP filed Dec. 30, 1997) (per curiam) (before Clark, Pearson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court order appointing a trustee and eliminating the plan exclusivity period was AFFIRMED because the appointment of a trustee was in the best interest of creditors

and other interests of the estate. Discussion of **11 U.S.C. § 1104(a)(1) and (2)**. A strict cost-benefit analysis is not required in determining whether a trustee should be appointed under § 1104(a)(2).

38. ***In re Woods*, 215 B.R. 623 (10th Cir. BAP 1998) (Robinson, J.) (before Pusateri, Boulden, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *aff'd*, 173 F.3d 770 (10th Cir. 1999), *cert. denied*, 528 U.S. 878 (1999).**

A bankruptcy court order granting a Chapter 11 trustee's motion to approve a sale of property postconfirmation, and denying a debtor's motion to require a bond and an accounting was AFFIRMED. The Court refused to consider certain issues related to the sale motion under the **law of the case doctrine** as a district court had already decided them. However, an order disallowing the debtors' request to bid at the sale did not violate **due process** as the debtors were afforded the protections of **11 U.S.C. § 363** and the plan confirmation process. The fact that the trustee was not bonded at the time of the sale as required under **11 U.S.C. § 322(a)** did not invalidate the sale inasmuch as the debtors were bound under **11 U.S.C. § 1141(a)** to the provisions of a confirmed plan, which did not require the trustee to be bonded to conduct the sale, and case law interpreting § 322(a) does not require a sale to be invalidated if a bond is not in place.

39. ***Andersen v. Higher Educ. Assistance Found. (In re Andersen)*, 215 B.R. 792 (10th Cir. BAP 1998) (Matheson, J.) (before McFeeley, C.J., and Cornish & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *aff'd*, 179 F.3d 1253 (10th Cir. 1999).**

A bankruptcy court order determining that a confirmed Chapter 13 plan containing a provision that the Chapter 13 debtor's student loan obligations were dischargeable as an "undue hardship" under **11 U.S.C. § 523(a)(8)(B)** was not binding as it was not a judicial determination of undue hardship was REVERSED, and the case was REMANDED for further proceedings. The creditor had notice of the confirmation of the plan and upon confirmation, the plan became binding on it and the issue of dischargeability under § 523(a)(8)(B) was ***res judicata***. The case was remanded to allow the bankruptcy court to determine whether the debtor was entitled to fees and costs under 11 U.S.C. § 524.

40. ***Aspect Tech. v. Simpson (In re Simpson)*, 215 B.R. 885 (10th Cir. BAP 1998) (per curiam) (before Pearson, Robinson, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A cross appeal was DISMISSED for lack of jurisdiction because the cross-appellant's notice of appeal was untimely under **Fed. R. Bankr. 8002(a).** Compliance with the timing requirements set forth in Rule 8002(a) is mandatory and jurisdictional, and the filing date of a notice of appeal is the date that it is received by the clerk of court, not the date that it is mailed. Extensions of time to file a notice of appeal are governed by Rule 8002, not Fed. R. Bankr. P. 9006, and, therefore, the cross-appellant could not seek an

extension of time to file a notice of appeal as the time for requesting such an extension under Rule 8002 had expired.

41. ***In re Country Club Foods, Inc.*, 226 B.R. 284, 1998 WL 63558, BAP No. UT-97-033 (10th Cir. BAP filed Feb. 4, 1998) (Matheson, J.) (before McFeeley, C.J., and Pusateri & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order authorizing the Chapter 11 debtor's rejection of certain distributor agreements was AFFIRMED because the appellant failed to provide a record to the Court for review.

42. ***In re Sorrells*, 218 B.R. 580 (10th Cir. BAP 1998) (Clark, J.) (before McFeeley, C.J., and Clark & Pearson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

Leave was GRANTED under **28 U.S.C. § 158(a)(3)** to review an interlocutory order of the bankruptcy court denying a motion by the United States trustee to dismiss a case for lack of venue, the order was REVERSED, and the case was REMANDED to the bankruptcy court to allow it to determine whether the case should be dismissed or transferred to a judicial district in which venue was proper. If venue of a case is improper under **28 U.S.C. § 1408**, a bankruptcy court may not retain the case, but rather must transfer or dismiss the case to a district in which venue is proper under **28 U.S.C. § 1406(a) and Fed. R. Bankr. P. 1014**. **28 U.S.C. § 1412** is limited to providing for transfer of cases in which venue is proper in the first instance.

43. ***Savage v. Internal Revenue Serv. (In re Savage)*, 218 B.R. 126 (10th Cir. BAP 1998) (Cornish, J.) (before Clark, Pearson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *appeal dismissed*, No. 98-8022 (10th Cir. filed July 8, 1998).**

A bankruptcy court order finding that a portion of the debtor's tax debts were nondischargeable under **11 U.S.C. §§ 507(a)(8)(A)(ii)** and **523(a)(1)(A)**, and that the remainder of the debt was not excepted from discharge under **11 U.S.C. § 523(a)(1)(B)(i)** was AFFIRMED in part and REVERSED in part. Where the debtor did not file his tax returns for certain years in the proper place, the returns were not "filed" and, therefore, the tax debt for those years was nondischargeable under § 523(a)(1)(B)(i). The debtor's tax returns for the remaining tax years were "filed," as they were filed in the proper place, and were "returns," even though the IRS had filed substitute returns as a result of the debtor's failure to file timely returns. Thus, the debtor's tax debt for those years was not excepted from discharge under § 523(a)(1)(B)(i).

44. ***In re Theobald*, 218 B.R. 133 (10th Cir. BAP 1998) (Boulden, J.) (before Pearson, Boulden, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's order denying a secured creditor's motion requesting that the Chapter 7 debtors execute a deed on their mobile home and deliver it to the creditor in order to effectuate the surrender of the home was AFFIRMED. Although the debtors had filed a statement of intention, as required under **11 U.S.C. § 521(2)**, which indicated that they would surrender the mobile home, § 521(2) did not provide the creditor with any right to title in the property. Rather, that section is merely a notice provision, and the creditor was required to foreclose on the property in order to obtain title.

45. ***In re Buckner*, 218 B.R. 137 (10th Cir. BAP 1998) (Boulden, J.) (Matheson, J., concurring) (before Boulden, Cornish, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas, *reported at* 211 B.R. 46 (1997); *see In re Buckner*, 165 B.R. 942 (D. Kan. 1994)), *appeal dismissed*, No. 98-3126 (10th Cir. filed July 21, 1998).**

The bankruptcy court's orders in two cases, which were consolidated for review on appeal, rejecting the government's right to setoff monies due to the debtors under the Conservation Reserve Program against monies that the debtors owed to it based on certain prepetition claims under **11 U.S.C. § 553(a),** was REVERSED.

In the first case, *In re Buckner*, the bankruptcy court abused its discretion in refusing to apply a district court order allowing the United States a right to setoff as **law of the case**.

In the second case, *Tuttle v. United States (In re Tuttle)*, the bankruptcy court erred in determining that the government's debt to the debtor under the Conservation Reserve Program arose postpetition. Since both the government's debt to the debtor and the government's claim against the debtor arose prepetition, the debt and claim were subject to setoff under § 553(a).

46. ***In re Beery*, BAP No. NM-98-003 (10th Cir. BAP filed Mar. 5, 1998) (before Clark, Pearson, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico), *appeal dismissed*, No. 98-2099 (10th Cir. filed Aug. 20, 1998).**

The Court DENIED the appellant's motion for leave to appeal an interlocutory order pursuant to **28 U.S.C. § 158(a)(3)** setting aside a final decree and reopening a bankruptcy case that had been inadvertently closed, and DISMISSED the appeal.

47. ***Dixon v. I.R.S. (In re Dixon)*, 218 B.R. 150 (10th Cir. BAP 1998) (Pusateri, J.) (before McFeeley, C.J., and Pusateri & Clark, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma, *reported at* 209 B.R. 535 & 210 B.R. 610 (1997)).**

A bankruptcy court order declaring that the government's claim had been discharged under **11 U.S.C. § 1328(a)** was AFFIRMED. The debtors' confirmed Chapter 13 plan provided for the government's claim as a priority claim under **11 U.S.C. § 507(a)(8)(A)**,

but the government was not paid because it did not file a proof of claim for its prepetition claim. **11 U.S.C. § 1305(a)** did not excuse the government's failure to file a proof of claim, as that section only applies to postpetition claims. The government's claim was a priority claim under § 507(a)(8)(A) as it was a prepetition claim, notwithstanding the fact that the debtors were not required to file a tax return until the postpetition period. The government also could not claim that it had unilaterally decided that its claim would be subject to different treatment as **11 U.S.C. § 1322(a)(2)** requires an "agreement" of the debtor and government. Finally, the Court rejected the government's argument that its claim had not been discharged because the Bankruptcy Code does not expressly provide for the discharge of claims where a proof of claim has not been filed. Although there is no such provision, claims for which a proof of claim has not been filed are subject to discharge.

48. ***In re McCarn*, 218 B.R. 154 (10th Cir. BAP 1998) (Bohanon, J.) (before Pusateri, Bohanon, & Pearson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

Leave was GRANTED under **28 U.S.C. § 158(a)(3)** to hear an appeal from a bankruptcy court order denying confirmation of a Chapter 13. The bankruptcy court's order denying confirmation was AFFIRMED because **11 U.S.C. § 1322(c)(1)** prohibited the debtors from curing a mortgage default pursuant to **11 U.S.C. § 1322(b)** as their home was sold at a foreclosure sale prior to the commencement of the case. The debtors' right to redeem the property under Wyoming law did not affect the application of § 1322(c)(1). A right of redemption is separate from a right to cure under § 1322(b), and the filing of a bankruptcy case neither revives nor expands a right of redemption.

49. ***Morris v. First Nat'l Bank & Trust of Phillipsburg (In re Taylor)*, 226 B.R. 284, 1998 WL 123027, BAP No. KS-97-064 (10th Cir. BAP filed Mar. 19, 1998) (Clark, J.) (before McFeeley, C.J., and Clark & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order avoiding a creditor's unperfected interest in the debtors' automobile under **11 U.S.C. § 544(a)(1)** was AFFIRMED. The creditor argued that its interest was not avoidable because it was not a transfer of an interest of the debtor in property as the debtors had claimed the vehicle as exempt. The creditor could not assert the debtors' exemptions as a defense to the § 544(a)(1) action, and, even if it could, the defense would fail because property claimed as exempt is nevertheless property of the debtor as of the petition date.

The Court refused to address issues raised by the creditor related to the propriety of the bankruptcy court's decision under **11 U.S.C. § 551** because the creditor lacked standing to appeal as it did not have a direct stake in the outcome of the matter.

50. ***First Nat'l Bank & Trust Co. of Ada v. Nemecek (In re Nemecek)*, 226 B.R. 284, 1998 WL 165168, BAP Nos. EO-97-051 & EO-97-054 (10th Cir. BAP filed Apr. 2, 1998)**

(Pearson, J.) (before Pusateri, Pearson, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).

A bankruptcy court order regarding claims under 11 U.S.C. §§ 523(a) and 727(a) was VACATED, and the case was REMANDED to the bankruptcy court for entry of separate findings of fact and conclusions of law as required under **Fed. R. Bankr. P. 7052**.

51. ***In re Egbert Dev., LLC*, 219 B.R. 903 (10th Cir. BAP 1998) (Clark, J.) (before Clark, Pearson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A motion for summary disposition was GRANTED and the appeal was DISMISSED because it was **moot** as the debtor-appellant failed to obtain a stay pending appeal of the bankruptcy court's order granting relief from the automatic stay. Since the creditor-appellee had conducted its foreclosure sale, the Court could not grant any effective relief on appeal. The fact that the debtor had a right to redeem the property under Wyoming law did not provide the Court with jurisdiction over the appeal. Case law regarding **former Fed. R. Bankr. P. 805** and **11 U.S.C. § 363(m)** was inapplicable to a foreclosure sale conducted after a creditor obtained relief from the automatic stay.

52. ***In re Karbel*, 220 B.R. 108 (10th Cir. BAP 1998) (Robinson, J.) (before Bohanon, Boulden, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court order refusing to vacate an order confirming the debtor's Chapter 13 plan due to inadequate notice was AFFIRMED. The debtor's service of his plan on a creditor at the mailing address provided by the creditor was proper under **Fed. R. Bankr. P. 7004(b)(3),** the creditor had actual notice of the debtor's plan prior to the entry of the confirmation order, and the notice that it received satisfied **due process** requirements. The bankruptcy did not abuse its discretion in refusing to grant relief under **Fed. R. Bankr. P. 9024** and **Fed. R. Civ. P. 60(b)**.

53. ***Sholer v. Carmichael (In re PKR, P.C.)*, 220 B.R. 114 (10th Cir. BAP 1998) (Pearson, J.) (before Bohanon, Pearson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court order avoiding a postpetition transfer pursuant to **11 U.S.C. § 549(a)** was AFFIRMED. The Court rejected the argument that the transfer was not a transfer of the debtor's property as the property was held by the debtor under a **constructive trust**. The Court also rejected the argument that the transfer was properly made in the ordinary course of business under **11 U.S.C. § 1108**, as that section does not permit the payment of prepetition debts.

54. ***In re Spriggs*, 219 B.R. 909 (10th Cir. BAP) (per curiam) (before McFeeley, C.J., and Boulden & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for**

the District of Kansas), ***aff'd without opinion,*** **166 F.3d 343 (10th Cir. 1998).**

A bankruptcy court order disallowing a portion of a creditor's proof of claim seeking fees and costs incurred when it foreclosed on the debtor's property in violation of the automatic stay under **11 U.S.C. § 362** was AFFIRMED. Equitable principles as set forth in *In re Calder*, 907 F.2d 953 (10th Cir. 1990) did not apply under the facts of the case.

55. ***In re Hill*****, 226 B.R. 284, 1998 WL 208809, BAP No. KS-97-099 (10th Cir. BAP filed Apr. 20, 1998) (Matheson, J.) (before Bohanon, Boulden, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order denying the debtor's motion to avoid a lien pursuant to **11 U.S.C. § 522(f)(1)** was AFFIRMED. A purchase money security interest in household goods was not transformed into a nonpurchase money security interest as required under § 522(f)(1)(B) by the creditor's refinance of the transaction. Under *In re Billings*, 838 F.2d 405 (10th Cir. 1988), the parties' intent determines whether a refinanced debt will retain is purchase money character. The debtor did not supply any record regarding the parties' intent and, therefore, the bankruptcy court's decision was affirmed.

56. ***In re Montgomery*****, 219 B.R. 913 (10th Cir. BAP 1998) (McFeeley, C.J.) (before McFeeley, C.J., and Bohanon & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas),** ***aff'd,*** **224 F.3d 1193 (10th Cir. 2000).**

A bankruptcy court order denying the trustees' motions in several consolidated cases for turnover of earned income credits was REVERSED and REMANDED. Earned income credits are property of the estate under **11 U.S.C. § 541(a)(1)** and, therefore, the Chapter 7 debtors were required to turnover to the trustees those portions of the credits attributable to the prepetition portion of the year in which they accrued.

57. ***Austin v. Buck (In re Buck)*****, 226 B.R. 284, 1998 WL 190531, BAP No. WY-98-004 (10th Cir. BAP filed Apr. 22, 1998) (Clark, J.) (before Pusateri, Clark, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court judgment order overruling a creditor's objection to the debtor's discharge under **11 U.S.C. § 727(a)(4)(A)** was AFFIRMED. The bankruptcy court's findings that the debtor's false oaths were not made "knowingly" and "willfully with intent to defraud," were not clearly erroneous.

58. ***Forrest v. Internal Revenue Serv. (In re Forrest),*** **226 B.R. 284, 1998 WL 211964, BAP No. WO-97-101 (10th Cir. BAP filed Apr. 30, 1998) (Clark, J.) (before McFeeley, C.J., and Clark & Pearson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma,** ***reported at*** **220 B.R. 424 (1997)).**

A bankruptcy court judgment denying the debtor's motion for summary judgment and granting the Internal Revenue Service's cross-motion for summary judgment on the debtor's **11 U.S.C. §§ 522(h) and 547(b)** actions was AFFIRMED. Even if the debtor has the power to avoid a transfer to the IRS pursuant to §§ 522(h) and 547(b), under **11 U.S.C. § 522(c)(2)(B)**, as interpreted in *Straight v. First Interstate Bank (In re Straight)*, 207 B.R. 217 (10th Cir. BAP 1997) [10], the property in question will nonetheless be liable for the IRS's debt if it is secured by a properly filed tax lien.

59. ***Berger v. Buck (In re Buck)*, 220 B.R. 999 (10th Cir. BAP 1998) (Pusateri, J.) (before Pusateri, Clark, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order refusing to excuse a debt from discharge under **11 U.S.C. § 523(a)(6)** was AFFIRMED. The bankruptcy court, applying then-existing Tenth Circuit case law, applied a less stringent standard for nondischargeability under § 523(a)(6) than now applies under *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). Since the debt was found to be dischargeable under the less strenuous, *pre-Kawaauhau* test, it could not be nondischargeable under *Kawaauhau*. The Court was not able to review the bankruptcy court's factual findings related to the dischargeability of the debt under a clearly erroneous standard because the plaintiff-appellant had not provided it with a complete transcript of the proceeding below. Finally, the Court rejected the debtor's argument that the bankruptcy court's order granting the plaintiff an extension of time to appeal under **Fed. R. Bankr. P. 8002(c)** was an abuse of discretion.

60. ***Payne v. Clarendon Nat'l Ins. Co. (In re Sunset Sales, Inc.)*, 220 B.R. 1005 (10th Cir. BAP 1998) (Boulden, J.) (before McFeeley, C.J., and Pearson & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *aff'd*, 195 F.3d 568 (10th Cir. 1999).**

A bankruptcy court judgment determining that certain transfers made to the defendants were avoidable under **11 U.S.C. § 547(b)** was AFFIRMED. The Court had jurisdiction to hear the appeal because former **11 U.S.C. § 546(a)** (amended 1994) did not bar the plaintiff's avoidance action as it was commenced within two years of a liquidating trustee's appointment. The Court rejected the defendants' arguments that the transfers were not an interest of the debtor in property made on account of an antecedent debt owed by the debtor because the transfers were made by a successor in interest to the debtor. Under Oklahoma law and **11 U.S.C. § 541(a)**, the debtor obtained all of the assets and liabilities of the successor and, therefore, the transfers made by the successor were those of the debtor for purposes of § 547(b). The bankruptcy court did err in allowing the plaintiff to present evidence of insolvency, even though insolvency was not asserted in his complaint, it applied the correct standard for determining insolvency under § 547(b)(3), and its findings regarding insolvency were not clearly erroneous. Furthermore, the bankruptcy court did not err in applying the one-year reach back period under § 547(b)(4)(B) as the transfers in question provided a "cognizable benefit" to guarantors and codebtors of the debts. **11 U.S.C. § 547(c)(1)** did not apply as all of the

transfers in question were late payments and, therefore, were not "in fact" substantially contemporaneous. The Court rejected the defendants' argument that even though the payments were late, they were contemporaneous because the defendants continued to provide "value." The transfers were also not protected under **11 U.S.C. § 547(c)(2)** because the defendants did not meet their burden of proof under § 547(c)(2)(C). Finally, the bankruptcy court correctly found that the transfers were not protected under **11 U.S.C. § 547(c)(4)**.

61. ***In re Higgins*, 220 B.R. 1022 (10th Cir. BAP 1998) (Robinson, J.) (before Pusateri, Robinson, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A bankruptcy court order denying the appellant's motion pursuant to **Fed. R. Bankr. P. 8002(c)** was AFFIRMED as the bankruptcy court did not abuse its discretion in refusing to grant the appellant a 20-day extension of the appeals period. Moreover, the Court lacked jurisdiction to review the bankruptcy court's orders regarding the allowance of the creditor's claim because the appellant did not file a timely notice of appeal therefrom. The appellant's motion for an extension of time did not serve to toll the 10-day period applicable to the orders regarding the allowance of her claim.

62. ***Aspect Tech. v. Simpson (In re Simpson)*, 226 B.R. 284, 1998 WL 296331, BAP No. EO-97-050 (10th Cir. BAP filed June 8, 1998) (Pearson, J.) (before Pearson, Robinson, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

Two bankruptcy court orders, one holding a state court award for compensatory damages for conversion to be nondischargeable and one holding a state court award for punitive damages based on either conversion or breach of contract to be nondischargeable, was REVERSED in part and AFFIRMED in part, and the matter was REMANDED to the bankruptcy court. The bankruptcy court's finding that the judgment for conversion was based on the debtor's intent to harm the creditor was not clearly erroneous and, therefore, its finding that the compensatory damages awarded for conversion were nondischargeable under **11 U.S.C. § 523(a)(6)** was affirmed. The bankruptcy court erred, however, in finding that punitive damage awards are *per se* nondischargeable. Under *Cohen v. de la Cruz*, 523 U.S. 213 (1998) and **11 U.S.C. § 523(a)(2)**, punitive damages may only be dischargeable if the underlying compensatory damages are dischargeable. The bankruptcy court erred in making its ruling on the dischargeability of the punitive damages award prior to determining whether the compensatory damages award was dischargeable. It was impossible to determine from the appellate record whether the punitive damages award was attributable to the conversion cause of action or the breach of contract cause of action and, therefore, the case was remanded to the bankruptcy court for further proceedings as to the dischargeability of the punitive damages judgment. The bankruptcy court's implicit rejection of the debtor's argument under the "**clean hands doctrine**" was not clearly erroneous.

63. ***Haughey v. Haughey (In re Haughey)*, 226 B.R. 284, 1998 WL 296018, BAP. No. EO-97-076 (10th Cir. BAP filed June 8, 1998) (Matheson, J.) (before Pusateri, Robinson, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A bankruptcy court order holding that an alimony obligation was not excepted from discharge under **11 U.S.C. § 523(a)(15)** because the debtor did not have the ability to pay it was VACATED, and the matter was REMANDED to the bankruptcy court for further proceedings. The bankruptcy court based its decision regarding dischargeability on a budget that the debtor had submitted that included child support obligations, the amount of which had been contested by the debtor in state court and were the subject of an appeal. The bankruptcy court erred in failing to consider the effect of the debtor's appeal on the child support obligations. If the debtor prevailed, and his child support obligations were reduced, his ability to pay alimony to his former spouse may be feasible.

64. ***In re Abraham*, 221 B.R. 782 (10th Cir. BAP 1998) (Cornish, J.) (before Pusateri, Robinson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order partially disallowing debtors' counsel's application seeking compensation and reimbursement of expenses, and enjoining counsel from postconfirmation collection of the disallowed fees from the debtors was AFFIRMED. The bankruptcy court did not abuse its discretion in disallowing the fees under **11 U.S.C. § 330** as the services rendered did not benefit the estate. Moreover, the bankruptcy court did not err in finding that the services did not benefit the debtors personally and, therefore, the injunction against postconfirmation collection was appropriate.

65. ***Payne v. Clarendon Nat'l Ins. Co. (In re Sunset Sales, Inc.)*, 222 B.R. 914 (10th Cir. BAP 1998) (Boulden, J.) (before McFeeley, C.J., and Pearson & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *aff'd*, 195 F.3d 568 (10th Cir. 1999).**

A motion for stay pending appeal to the United States Court of Appeals for the Tenth Circuit, and a motion to recall or stay the mandate that had been issued by the Court were DENIED. The Court had properly issued a mandate in this appeal pursuant to **10th Cir. BAP L.R. 8016-3** and, therefore, it was not appropriate to stay the mandate. Additionally, extraordinary circumstances did not exist to justify the recalling of the mandate. Since the mandate had been issued, the Court no longer had jurisdiction over the appeal. Thus, it could not consider the appellants' motion for stay pending appeal.

66. ***In re Cook*, 223 B.R. 782 (10th Cir. BAP 1998) (Pusateri, J.) (before Pusateri, Robinson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *appeal dismissed*, No. 98-8098 (10th Cir. filed Mar. 10, 1999).**

A bankruptcy court order disqualifying an attorney as counsel for the Chapter 7 trustee

and requiring the attorney to disgorge all of the fees and expenses that he had previously been paid from the estate was AFFIRMED. The bankruptcy court did not err in disqualifying the attorney, who represented the trustee in several related Chapter 7 cases as well as creditors of one of the debtors, as he had an actual conflict of interest that barred his employment under **11 U.S.C. § 327(a) and (c)**. The bankruptcy court also did not abuse its discretion under **11 U.S.C. § 328(c)** in ordering the attorney to disgorge the fees and expenses that he had been paid because the attorney failed to disclose that he was retained by the creditor clients under a contingency fee contract that gave him a direct pecuniary stake in the outcome of the disputes between the estate and his creditor clients.

67. ***Sherman v. Rose (In re Sherman),*** **223 B.R. 555 (10th Cir. BAP 1998) (Bohanon, J.) (before McFeeley, C.J., and Bohanon & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming),** ***questioned in Kojima v. Grandote Int'l Ltd. Liability Co. (In re Grandote Country Club Co., Ltd.),*** **252 F.3d 1146 (10th Cir. 2001)**.

A bankruptcy court judgment dismissing a complaint seeking to avoid a transfer under 11 U.S.C. § 548(a)(2)(B) (which has since been redesignated as **11 U.S.C. § 548(a)(1)(A)**) was REVERSED and the matter was REMANDED. A tax sale held in accordance with Wyoming law was not for "reasonably equivalent value." The Court refused to apply the rule in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), because the tax sale in question was not similar to the mortgage foreclosure sale conducted in that case.

68. ***In re Dewey,*** **223 B.R. 559 (10th Cir. BAP 1998) (Boulden, J.) (before McFeeley, C.J., and Bohanon & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming),** ***aff'd without opinion,*** **202 F.3d 281 (10th Cir. 1999).**

A bankruptcy court judgment sustaining an objection to the debtor's Chapter 13 plan on the basis that it failed to provide for the objecting party's **11 U.S.C. § 507(a)(7)** priority claim was AFFIRMED. The Court had jurisdiction over the order appealed under **28 U.S.C. § 158(a)(1)** despite the fact that it was from an order denying confirmation of a plan because, since the appeal had been filed, the bankruptcy court had confirmed a plan which provided for the priority claim to the extent that it was allowed on appeal. The bankruptcy court did not err in finding that certain codebts of the debtor and the objecting party, the debtor's former spouse, were "support" and, thus, entitled to priority under § 507(a)(7). In analyzing the definition of "support" in § 507(a)(7), the Court relied on the definition of that word as it has been developed in relation to **11 U.S.C. § 523(a)(5)**, because the language of the two sections are nearly identical.

69. ***In re Blagg,*** **223 B.R. 795 (10th Cir. BAP 1998) (Robinson, J.) (Matheson, J., dissenting) (before Pusateri, Robinson, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma,** ***reported at*** **215 B.R. 79 (1997)),** ***appeal dismissed without opinion,*** **198 F.3d 257 (1999).**

A bankruptcy court order granting a motion to dismiss for improper venue and for sanctions was AFFIRMED, and an order awarding the trustee fees and expenses was REMANDED for further proceedings. The bankruptcy court did not abuse its discretion in finding that the trustee's motion to dismiss the debtors' Chapter 7 case was timely filed under **Fed. R. Bankr. P. 1014(a)**. Furthermore, the court did not err in determining that a salaried individual's place of business is not a "place of business" under **28 U.S.C. § 1408**. Rather, in individual debtor cases, venue lies in the place of the debtor's residence or domicile. Since venue was improper, the bankruptcy court could not retain the case, and it did not abuse its discretion in dismissing the case, as opposed to transferring it to the proper venue. The bankruptcy court did not abuse its discretion in ordering sanctions against debtors' counsel under **Fed. R. Bankr. P. 9011** (pre-1997 version) for improperly commencing the case in an improper venue or for misrepresenting the law because the sanctions were warranted and the amount of the sanctions was appropriate. However, since the debtors did not have an opportunity to respond to the fees and expenses requested by the trustee, the order allowing such fees and costs was remanded for further proceedings.

70. ***In re Kline*, 226 B.R. 284, 1998 WL 637276, BAP No. NM-98-009 (10th Cir. BAP filed Sept. 14, 1998) (Bohanon, J.) (before Clark, Bohanon, & Pearson, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico)**.

A bankruptcy court order requiring the *pro se* Chapter 11 debtor to make adequate protection payments to a secured creditor was AFFIRMED. The creditor was entitled to adequate protection, and the form of adequate protection, as defined in **11 U.S.C. § 361**, was solely with the bankruptcy court's discretion. The bankruptcy court could have terminated the stay under **11 U.S.C. § 362(d)(1)** due to the debtor's failure to propose adequate protection. The creditor was not required to turn over rents that he had collected from the property because the debtor had not commenced a **11 U.S.C. § 542** action and, even if she had, the creditor would have been entitled to the rents as adequate protection to compensate him for his investment in the property. The bankruptcy court was also empowered under **11 U.S.C. § 105(a)** to enter a drop-dead order, requiring that the automatic stay terminate if the debtor failed to comply with its order or confirm a plan by a date certain, and it did not abuse its discretion in so doing.

71. ***In re Long Shot Drilling, Inc.*, 224 B.R. 473 (10th Cir. BAP 1998) (Boulden, J.) (before McFeeley, C.J., and Pusateri & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

Appeals from an order confirming a Chapter 11 plan and an order granting a motion to modify the confirmed plan were DISMISSED under the doctrine of equitable or prudential **mootness**. The appellant failed to obtain a stay pending appeal of either order, the plan was substantially consummated, and the Court was unable to provide effective relief without adversely affecting third parties who are not parties to the appeals.

72. ***Maya v. Las Cruces Truck & Equip. Serv. (In re Maya)*, 233 B.R. 176, 1998 WL**

721233, BAP No. NM-98-013 (10th Cir. BAP filed Oct. 15, 1998) (Matheson, J.) (before Bohanon, Robinson, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).

An appeal from a bankruptcy court order granting the defendant-creditor's motion for nonsuit or directed verdict where the plaintiff-debtor failed to prove that she sustained any damages as a result of the defendant's violation of the automatic stay was AFFIRMED. The plaintiff failed to provide a sufficient record for the Court to review as required under **Fed. R. Bankr. P. 8006** and **10th Cir. BAP L.R. 8009-1(a)**. As such, the Court was unable to determine whether the bankruptcy court's factual findings under **11 U.S.C. § 362(h)** were clearly erroneous.

73. ***Diviney v. NationsBank (In re Diviney)*, 225 B.R. 762 (10th Cir. BAP 1998) (Pusateri, J.) (before McFeeley, C.J., and Pusateri & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma, *reported at* 211 B.R. 951(1997)).**

A bankruptcy court order entered pursuant to **11 U.S.C. § 362(h)**, awarding actual and punitive damages and attorney's fees, was AFFIRMED. The bankruptcy court did not err in determining that the creditor had violated the automatic stay under **11 U.S.C. § 362(a)** in a case which had been dismissed and was reinstated. Although the stay terminated when the debtors' case was dismissed under **11 U.S.C. § 362(c)**, it was automatically reimposed when the bankruptcy court entered its order reinstating the case. Furthermore, the creditor's defenses related to a pre-confirmation order regarding a relief from stay stipulation were invalid as the order did not survive confirmation of the debtors' Chapter 13 plan under **11 U.S.C. § 1327(a)**. The Court discusses the "willful" standard under § 362(h), and distinguishes it from a stricter interpretation of "willful" applied under 11 U.S.C. § 523(a)(6). Applying the less strict standard, the Court determined that the bankruptcy court did not err in determining that the creditor's actions were "willful." In addition, the bankruptcy court's imposition of punitive damages under § 362(h) was appropriate, and the damages assessed, although high, were not excessive.

74. ***Chevy Chase Bank FSB v. Kukuk (In re Kukuk)*, 225 B.R. 778 (10th Cir. BAP 1998) (Clark, J.) (before Clark, Pearson, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order determining that a credit card debt related to cash advance debt was nondischargeable under **11 U.S.C. § 523(a)(2)(A)** was REVERSED and the matter was REMANDED. The use of a credit card creates an implied representation of an intent to repay the card, but not of an ability to repay the card. Thus, a credit card debt, whether for purchases or for cash advances, will be nondischargeable under § 523(a)(2)(A) if, under all of the circumstances of the case, the debtor's implied representation as to his or her intent to repay the card is fraudulent, *i.e.*, if the debtor had no intent to repay at the time that each charge was incurred.

75. ***In re BYOC Int'l, Inc.*, 233 B.R. 176, 1998 WL 780435, BAP No. WO-97-103 (10th**

Cir. BAP filed Nov. 10, 1998) (McFeeley, C.J.) (before, McFeeley, C.J., and Pusateri & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).

A bankruptcy court order allowing a claim against the debtor's owner on the basis that the owner was an alter ego of the debtor was REVERSED and the matter was REMANDED. There was insufficient evidence to support the bankruptcy court's findings that the doctrines of **alter ego** or **reverse-piercing of the corporate veil** should apply. The bankruptcy court relied on **judicial estoppel** to allow the claim, and this doctrine is not recognized in the Tenth Circuit.

76. ***Loyd v. Cmty. First State Bank (In re Hannah)*, 233 B.R. 176, 1998 WL 787745, BAP No. WO-98-020 (10th Cir. BAP filed Nov. 13, 1998) (Pusateri, J.) (before McFeeley, C.J., and Pusateri & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *appeal dismissed for lack of jurisdiction*, No. 98-6468 (10th Cir. filed Apr. 26, 1999).**

A bankruptcy court order, issued on motions for summary judgment, declaring that the debtor's interest in a trust was not property of her estate under **11 U.S.C. § 541(c)(2)** was REVERSED and the matter was REMANDED. Insufficient facts were provided to the bankruptcy court to allow it to decide whether the trust in issue was a spendthrift trust under Nebraska law and, therefore, summary judgment was not appropriate.

77. ***Smolen v. Hatley (In re Hatley)*, 227 B.R. 757 (10th Cir. BAP 1998) (Robinson, J.) (before McFeeley, C.J., and Robinson & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma, *reported at* 227 B.R. 753), *aff'd*, 194 F.3d 1320 (10th Cir. 1999).**

A bankruptcy court order refusing to except a debt from discharge under **11 U.S.C. § 523(a)(4)** was AFFIRMED. The bankruptcy court did not err in determining the lack of a fiduciary relationship.

78. ***In re Jones*, 233 B.R. 176, 1998 WL 870341, BAP No. WY-98-015 (10th Cir. BAP filed Dec. 15, 1998) (Cornish, J.) (before Clark, Robinson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order denying a motion to reconsider an order allowing a claim against the debtors was AFFIRMED. The debtors' motion to reconsider was to be treated as a motion under Fed. R. Civ. P. 60(b) as made applicable to bankruptcy proceedings under **Fed. R. Bankr. P. 9024**. Under standards applicable to Rule 60(b), the bankruptcy court did not abuse its discretion in denying the motion to reconsider. The Court did not have jurisdiction to consider the merits of the underlying order allowing the creditor's claim because the time to appeal that order under **Fed. R. Bankr. P. 8002(b)** had expired as it was not tolled by the filing of the debtors' motion to reconsider.

79. ***In re Dickerson*, 227 B.R. 742 (10th Cir. BAP 1998) (Boulden, J.) (before Boulden, Robinson, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order sustaining an objection to the debtor's claimed exemption under Oklahoma law for funds received as a result of an earned income credit was AFFIRMED. The funds were not "earnings from personal services" as required under Oklahoma law, but rather were more akin to a tax overpayment, which have been held not be "earnings."

80. ***Park v. Rider (In re Rider)*, 233 B.R. 176, 1998 WL 879507, BAP No. UT-98-001 (10th Cir. BAP filed Dec. 15, 1998) (Pusateri, J.) (before Pusateri, Pearson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order excepting from discharge the debtor's obligation to pay attorney's fees, costs and other expenses to his former spouse for certain custody litigation pursuant to **11 U.S.C. § 523(a)(5)** was AFFIRMED.

81. ***In re Parrin*, 233 B.R. 176, 1998 WL 893155, BAP No. KS-97-055 (10th Cir. BAP filed Dec. 22, 1998) (Bohanon, J.) (before Bohanon, Boulden, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *aff'd without opinion*, 201 F.3d 448 (10th Cir. 1999).**

A bankruptcy court order finding that a motion to compel the debtors to appear at an examination pursuant to Fed. R. Bankr. P. 2004 in an insider's bankruptcy case did not violate the automatic stay under **11 U.S.C. § 362(a)(1)** was AFFIRMED. The action in the insider's case was not an act against the debtors, and the debtors were required to appear at the 2004 examination under **Fed. R. Bankr. P. 9001(5)(A)**.

82. ***In re Fross*, 233 B.R. 176, 1999 WL 26886, BAP No. KS-98-030 (10th Cir. BAP filed Jan. 15, 1999) (Boulden, J.) (before Bohanon, Boulden, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas, *reported at* 220 B.R. 405 (1998)), *appeal dismissed for lack of jurisdiction*, No. 99-3078 (10th Cir. filed June 30, 1999).**

A bankruptcy court order, ruling that the individual Chapter 11 debtors' retention of exempt property did not violate the absolute priority rule set forth in **11 U.S.C. § 1129(b)(2)(B)(ii)**, was REVERSED. The debtors' ownership interest in exempt property was junior to the interests of unsecured creditors and, therefore, the debtors' plan was not confirmable, as it was in violation of the absolute priority rule.

83. ***Household Bank, N.A. v. Sales (In re Sales)*, 228 B.R. 748 (10th Cir. BAP 1999) (Clark, J.) (before Clark, Pearson, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order denying the debtor's motion for attorney's fees and costs pursuant to **11 U.S.C. § 523(d)** was REVERSED and the matter was REMANDED for findings consistent with the opinion. The bankruptcy court erred in failing to make any findings as to whether the creditor's dischargeability action against the debtor was "substantially justified," and it was clear from the record that the creditor's position was not justified. Under **Fed. R. Bankr. P. 7036**, the creditor, who did not answer the debtor's requests for admissions, was deemed to have admitted that it did not investigate its dischargeability complaint and that there was no basis for the complaint.

84. ***In re Parsons*, 233 B.R. 176, 1999 WL 41835, BAP No. NM-98-038 (10th Cir. BAP filed Jan. 22, 1999) (Bohanon, J.) (before Clark, Bohanon, & Pearson, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court order denying the debtors' motion to avoid a creditor's judgment lien in part pursuant to **11 U.S.C. § 522(f)** was REVERSED and the matter was REMANDED. Applying the valuations found by the bankruptcy court, the lien impaired the debtors' exemption under the formula set forth in § 522(f)(2).

85. ***In re Davis*, 239 B.R. 573 (10th Cir. BAP 1999) (Robinson, J.) (before McFeeley, C.J., and Clark & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma, *reported at* 218 B.R. 177 (1998))**.

A bankruptcy court order denying confirmation of the debtor's Chapter 13 plan and dismissing his case was AFFIRMED. The bankruptcy court's decision that the debtor's plan had been proposed in bad faith in violation of **11 U.S.C. § 1325(a)(3)** was not clearly erroneous, and its dismissal of the case under **11 U.S.C. § 1307(c)** for cause was not an abuse of discretion. The trustee in the debtor's earlier Chapter 7 case was a "party in interest" under **11 U.S.C. § 1324**, with standing to object to the debtor's plan.

86. ***Joseph v. Lindsey (In re Lindsey)*, 229 B.R. 797 (10th Cir. BAP 1999) (Cornish, J.) (before Pusateri, Pearson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order finding the plaintiff-appellant in contempt for failing to comply with a discovery order and dismissing his adversary proceeding with prejudice was AFFIRMED. Dismissal of the action due to the plaintiff-appellant's failure to respond to the debtor-appellee's discovery requests was appropriate under **Fed. R. Bankr. P. 7037**. The plaintiff-appellant did not have the right to refuse to answer the discovery requests under a **Fifth Amendment privilege**. The debtor-appellee's motion for sanctions under **Fed. R. Bankr. P. 8020** was DENIED because the appeal was not frivolous.

87. ***Manchester v. Annis (In re Annis)*, 229 B.R. 802 (10th Cir. BAP 1999) (Matheson, J.) (before Pusateri, Clark, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *aff'd*, 232 F.3d 749 (10th Cir. 2000).**

A bankruptcy court order determining that the debtor's tax refunds were exempt "earnings" under Oklahoma Statute tit. 31, § 1.1.A was REVERSED. Tax refunds are not "earnings."

88. ***King v. King (In re King)*, 233 B.R. 176, 1999 WL 83927, BAP No. KS-98-036 (10th Cir. BAP filed Feb. 18, 1999) (Cornish, J.) (before Bohanon, Boulden, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order determining that a debt for prepetition child support was nondischargeable under **11 U.S.C. § 523(a)(5)** was AFFIRMED. Child support payments are property of the child and, therefore, the debtor's former spouse's Chapter 7 case did not constitute an "assignment" of the payments under § 523(a)(5)(A). The Court discusses the interplay between **11 U.S.C. §§ 522(d)(10)(D)** and **541(b)(1)**. Sanctions under **Fed. R. App. P. 38** or **Fed. R. Bankr. P. 8020** were not merited.

89. ***Tomlins v. BRW Paper Co. (In re Tulsa Litho Co.)*, 229 B.R. 806 (10th Cir. BAP 1999) (McFeeley, C.J.) (before McFeeley, C.J., and Clark & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court order dismissing a complaint seeking to avoid a preferential transfer was AFFIRMED. The bankruptcy court did not err in determining that the transfer fell within the ordinary course of business exception pursuant to **11 U.S.C. § 547(c)(2)**.

90. ***Vann v. U.S. Dept. of Educ. (In re Vann)*, 233 B.R. 176, 1999 WL 111925, BAP No. KS-98-081 (10th Cir. BAP filed Mar. 4, 1999) (Matheson, J.) (before Clark, Bohanon, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

The Court AFFIRMED a bankruptcy court order awarding the debtors sanctions pursuant to **11 U.S.C. § 362(h)** due to the Department of Education's willful violation of the automatic stay, and finding that the debtors' obligations to the Department of Education were not discharged pursuant to **11 U.S.C. § 523(a)(8)(B)** based on the terms of their confirmed Chapter 13 plan. The Court adopted the bankruptcy court's findings of fact and conclusions of law.

91. ***Snyder v. Janes (In re Janes)*, 233 B.R. 176, 1999 WL 128826, BAP No. KS-98-060 (10th Cir. BAP filed Mar. 5, 1999) (Bohanon, J.) (before McFeeley, C.J., and Bohanon & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *appeal dismissed*, No. 99-3114 (10th Cir. filed May 17, 1999).**

A bankruptcy court order dismissing a complaint was AFFIRMED because the appellant failed to provide an **adequate record for review**.

92. ***In re Coats*, 232 B.R. 209 (10th Cir. BAP 1999) (Robinson, J.) (before Clark, Pearson, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the**

Eastern District of Oklahoma).

A bankruptcy court order denying a motion to avoid a judicial lien under **11 U.S.C. § 522(f)** was REVERSED and the matter was REMANDED. Under a recent amendment to Oklahoma law, judicial liens attach to a debtor's homestead; thus, the lien may be avoided under § 522(f). Section 522(f) preempts state law in determining whether a judicial lien impairs an exemption and may be avoided.

93. ***In re Hughes*, 233 B.R. 176, 1999 WL 232672, BAP No. EO-98-086 (10th Cir. BAP filed Apr. 15, 1999) (per curiam) (before McFeeley, C.J., and Clark & Pearson, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

For the reasons set forth in *In re Coats*, 232 B.R. 209 (10th Cir. BAP 1999) [92], a bankruptcy court order denying the debtor's motion pursuant to **11 U.S.C. § 522(f)** was REVERSED and the matter was REMANDED.

94. ***McCart v. Jordana (In re Jordana)*, 232 B.R. 469 (10th Cir. BAP 1999) (Pearson, J.) (before Clark, Pearson, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma, *reported at* 221 B.R. 950 (1998)), *aff'd without opinion*, 216 F.3d 1087 (10th Cir. 2000).**

Bankruptcy court orders (1) denying the debtor's motion to avoid a judicial lien pursuant to **11 U.S.C. § 522(f)**, and (2) granting a motion for summary judgment and excepting a debt from the debtor's discharge under **11 U.S.C. § 523(a)(2)(A) and (B)** were AFFIRMED. As to (1), under former Oklahoma law applicable in this case, judicial liens do not attach to exempt property. Thus, the lien was not avoidable under § 522(f). As to (2), the bankruptcy court held that a default judgment against the debtor collaterally estopped him from relitigating issues of fraud under § 523(a)(2)(A) and (B). The Court held that **collateral estoppel** applied to the default judgment. The issuance of the default judgment and its preclusive effect did not deprive the debtor of **due process**. The bankruptcy court also did not err in holding treble damages against the debtor to be nondischargeable under § 523(a)(2)(A).

95. ***Bailey v. Ogden (In re Ogden)*, 251 B.R. 441, 1999 WL 282732, BAP No. UT-98-042 (10th Cir. BAP filed Apr. 30, 1999) (Pusateri, J.) (Pearson, J., dissenting) (before Pusateri, Pearson, & Cornish, JJ.) (Appeal from the United States District Court for the District of Utah).**

A bankruptcy court order partially granting a trustee's motion for summary judgment, denying the debtor's discharge under **11 U.S.C. § 727(a)(3) and (a)(4)(A)**, was REVERSED and REMANDED. Although the bankruptcy court only ruled on two of the trustee's three causes of action, the order appealed was final and appealable as required under **28 U.S.C. § 158(a)(1)**. The bankruptcy court erred in granting summary judgment under § 727(a)(3) because there existed questions of fact as to whether the debtor failed

to keep records or if he was justified in not doing so. Also, the bankruptcy court erred in granting summary judgment under § 727(a)(4)(A) because there existed questions of fact as to whether the debtor knowingly and fraudulently made a false oath.

96. ***In re Pomodoro Rest.*, 251 B.R. 441, 1999 WL 282735, UT-98-045 (10th Cir. BAP filed May 3, 1999) (Robinson, J.) (before Pearson, Robinson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court's orders denying a lessor's motion for relief from stay and granting the debtor's motion to extend its time to assume or reject a nonresidential real property lease were AFFIRMED. The Court refused to consider whether the lease was exempt from the automatic stay because the issue had been **waived on appeal** as it had not been raised before the bankruptcy court. The bankruptcy court's conclusion that "cause" did not exist for lifting the automatic stay under **11 U.S.C. § 362(d)** was not an abuse of discretion as the debtor's case was not filed in bad faith. In addition, the bankruptcy court's **adequate protection** award was not clearly erroneous.

97. ***In re Christie*, 233 B.R. 110 (10th Cir. BAP 1999) (Pusateri, J.) (before Pusateri, Bohanon, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order denying the debtors' motion to compel the Chapter 7 trustee to withdraw a tax refund intercept and for turnover of any funds intercepted was REVERSED and the matter was REMANDED. The estate was not entitled to the refund because it was obtained as the result of the debtors' payment of their taxes with postpetition earnings and a postpetition loan. As a result, the refund was not property of the estate under **11 U.S.C. § 541(a)(1),** and the earnings that paid the taxes were was expressly excluded from property of the estate under **11 U.S.C. § 541(a)(6)**.

98. ***In re Fletcher*, 251 B.R. 441, 1999 WL 379089, EO-99-007 (10th Cir. BAP filed May 25, 1999) (per curiam) (before Pusateri, Clark, & Pearson, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

For the reasons set forth in *In re Coats*, 232 B.R. 209 (10th Cir. BAP 1999) [92], a bankruptcy court order denying the debtors' motion pursuant to **11 U.S.C. § 522(f)** was REVERSED and the matter was REMANDED.

99. ***Jubber v. Hatfield (In re Briggs)*, 251 B.R. 441, 1999 WL 513842, UT-99-003 (10th Cir. BAP filed June 24, 1999) (Bohanon, J.) (before Bohanon, Robinson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court judgment avoiding a transfer of two parcels of real property pursuant to **11 U.S.C. § 544(a)(3)** was AFFIRMED. The trustee had the rights of a *bona fide* purchaser of real property because he did not have actual or constructive notice of the transfers on the debtor's petition date. Although the real property was exempt under

Arizona law and, therefore, immune from forced sale, the trustee's sale of the property pursuant to **11 U.S.C. § 363(h)** was appropriate because the debtor did not timely object to the sale.

100. ***In re Olsen*, 251 B.R. 441, 1999 WL 513846, UT-98-088 (10th Cir. BAP filed June 24, 1999) (Cornish, J.) (before Bohanon, Robinson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order excusing the Chapter 7 trustee's compliance with **11 U.S.C. § 704(7)** was AFFIRMED. The debtor, who requested recordings of a **Fed. R. Bankr. P. 2004** examination, did not show good cause for her request and, therefore, the bankruptcy court did not abuse its discretion in excusing the trustee from producing the recordings under § 704(7). The trustee also was not required to produce the recordings under the Freedom of Information Act, **5 U.S.C. § 552**, because the debtor's request was strictly personal and was not for information regarding government operations. Furthermore, the trustee was not a government agency under the **5 U.S.C. § 551**, or under common law definitions of "agency."

101. ***In re Denton*, 251 B.R. 441, 1999 WL 513840, WO-98-084 (10th Cir. BAP filed June 24, 1999) (Boulden, J.) (before Boulden, Matheson, & Krieger, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order denying a motion to remove the Chapter 7 trustee was REVERSED and the matter was REMANDED, because the bankruptcy court failed to hold a hearing on the motion or to make findings of fact or conclusions of law as required under **Fed. R. Bankr. P. 7052**. The Court DISMISSED the appeal as it related to the portion of the bankruptcy court's order denying the appellants' motion to compel the trustee to turnover documents, because the Court lacked jurisdiction under **28 U.S.C. § 158(a)(1)**, and leave to appeal under **28 U.S.C. § 158(a)(3)** was not appropriate.

102. ***Rushton v. E & S Int'l Enters., Inc. (In re Eleva, Inc.)*, 235 B.R. 486 (10th Cir. BAP 1999) (Cornish, J.) (before Bohanon, Robinson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court judgment avoiding a transfer pursuant to **11 U.S.C. § 547(b)** was AFFIRMED. **11 U.S.C. § 547(c)(4)** was not a defense to the preferential transfer because the creditor extended new value to the debtor prior to the debtor's transfer. Furthermore, the creditor's forbearance of its right to stop shipment under state law was not "new value" under § 547(c)(4).

103. ***Mitsubishi Motors Credit of Am., Inc. v. Longley (In re Longley)*, 235 B.R. 651 (10th Cir. BAP 1999) (Krieger, J.) (before McFeeley, C.J., and Boulden & Krieger, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court judgment excepting a secured creditor's claim from discharge under **11 U.S.C. § 523(a)(6)** was REVERSED. The debtor, who relinquished title of the creditor's collateral at gunpoint, did not "willfully" injure the creditor because there was no evidence that when he gave title he intended to injure the creditor's lien interest.

104. ***In re King*, 235 B.R. 658 (10th Cir. BAP 1999) (per curiam) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma) (corrected Aug.31, 1999).**

An Appellee's election have appeal heard in the district court was GRANTED, and the appeal was transferred to the district court. An election to have an appeal heard by the district court, as opposed to the bankruptcy appellate panel, is jurisdictional and, therefore, the Court will review *sua sponte* whether a proper election has been made. The time for filing an election under **28 U.S.C. § 158(c)(1)(B)** is thirty days from the date that the bankruptcy court serves the notice of appeal pursuant to **Fed. R. Bankr. 8004**.

105. ***In re Hartley*, WY-98-85 (10th Cir. BAP filed July 19, 1999) (before Clark, Bohanon, & Pearson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *appeals dismissed*, Nos. 99-8067 & 99-8073 (10th Cir. filed Oct. 13, 1999).**

Appellee's request for sanctions pursuant to **Fed. R. Bankr. P. 8020** was DENIED.

106. ***In re John V. Francks Turkey Co.*, 251 B.R. 441, 1999 WL 565883, UT-98-066 (10th Cir. BAP filed Aug. 2, 1999) (Robinson, J.) (before Bohanon, Robinson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order confirming the debtor's Chapter 12 plan was AFFIRMED. The plan provided the debtor's secured creditor with the present value of its claim as required under **11 U.S.C. § 1225(a)(5)(B)**. The bankruptcy court did not abuse its discretion in allowing the debtor to pay the creditor over a 25-year period, and it properly applied a contract rate of interest. The bankruptcy court's finding that the plan was feasible under **11 U.S.C. § 1225(a)(6)** was not clearly erroneous.

107. ***In re Francks*, 251 B.R. 441, 1999 WL 565893, UT-98-064 (10th Cir. BAP filed Aug. 2, 1999) (Robinson, J.) (before Bohanon, Robinson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order confirming the debtors' Chapter 12 plan was REVERSED and the matter was REMANDED. Pursuant to **11 U.S.C. § 109(f)**, the debtors were ineligible for relief under Chapter 12 because they did not qualify as "family farmers" as that term is defined in **11 U.S.C. § 101(18)(A)**.

108. ***Patterson v. Washita State Bank (In re Denton)*, 236 B.R. 418 (10th Cir. BAP) (Matheson, J.) (before Boulden, Matheson, & Krieger, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *motion for***

***rehearing denied*, (10th Cir. BAP Aug. 26, 1999).**

The Court DISMISSED an appeal from a bankruptcy court order denying a motion to remand or for abstention due to lack of appellate jurisdiction. The order appealed was not a "final" order proper for appeal under **28 U.S.C. § 158(a)(1)** or the collateral order doctrine, and leave to appeal the order under **28 U.S.C. § 158(a)(3)** was not appropriate.

109. ***Abboud v. Abboud (In re Abboud)*, 237 B.R. 777 (10th Cir. BAP 1999) (Boulden, J.) (before Pusateri, Boulden, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma, *reported at* 232 B.R. 793).**

A bankruptcy court judgment allowing a proof of claim over the debtor's objection was AFFIRMED. The creditor's claim was based on a valid state court judgment, and the bankruptcy court was prevented under the ***Rooker-Feldman* doctrine** from reversing or vacating that judgment.

110. ***In re Rivermeadows Assocs., Ltd.*, 237 B.R. 492 (10th Cir. BAP 1999) (Clark, J.) (before Clark, Bohanon, & Pearson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order disallowing certain claimants' proofs of claims was AFFIRMED. The claims sought **attorneys' fees** incurred in defending against an avoidance action commenced against each of the claimants by the Chapter 7 trustee. The basis for allowance of the fees was a contract provision allowing fees in the event that either party to the contract was required to enforce its provisions against another party. The avoidance action was not within the terms of the contract provision, as the trustee was not a "party" under the contract, he was not asserting a claim of the debtor under the contract, and he was not seeking to enforce contract provisions.

111. ***In re Dewey*, 237 B.R. 783 (10th Cir. BAP 1999) (Bohanon, J.) (before Clark, Bohanon, & Pearson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order denying a final request for fees and costs by the Chapter 13 debtor's attorney was AFFIRMED. The bankruptcy court did not err in determining that the debtor's plan would not have been confirmable under the best interests of creditors test set forth in **11 U.S.C. § 1325(a)(4)** if the attorney had disclosed his fees and costs at the time of the confirmation hearing. The bankruptcy court also did not err in refusing to treat its confirmation order as ***res judicata*** as to the plan's feasibility. While the appellant's argument was better characterized as an offensive use of **collateral estoppel**, the bankruptcy court did not abuse its discretion in failing to apply this doctrine given the circumstances of the case.

112. ***In re Young*, 237 B.R. 791 (10th Cir. BAP 1999) (McFeeley, C.J.) (before McFeeley, C.J., and Boulden & Matheson, JJ.) (Appeal from the United States Bankruptcy**

Court for the Western District of Oklahoma)*, aff'd on other grounds,* 237 F.3d 1168 (10th Cir. 2001).

Two bankruptcy court orders, one confirming the debtor's Chapter 13 plan and the other denying a motion for a new trial to vacate the confirmation order, were AFFIRMED. In so doing, the Court refused to consider whether a debtor may receive two discharges in one case by filing a Chapter 7 petition, obtaining a discharge, and then converting its case to Chapter 13 and obtaining confirmation of a plan. This issue would have been properly considered in an appeal from the order converting the debtor's case. Since that order was not timely appealed under **Fed. R. Bankr. P. 8002**, the court lacked appellate jurisdiction to consider it. The bankruptcy court's conclusion that the plan was filed in good faith as required under **11 U.S.C. § 1325(a)(3)** was not in error. The proposal of a 3-year plan is not *per se* bad faith. Furthermore, the totality of the circumstances indicated that the debtor's plan was proposed in good faith even though the appellant's claim, which would be nondischargeable in Chapter 7, was to receive a *de minimis* payment under the plan. The bankruptcy court also did not err in determining that the debtor was devoting all of his disposable income to the plan as required under **11 U.S.C. § 1325(b)(1)(B)**. Finally, the bankruptcy court correctly decided that the appellant's motion for a new trial to vacate the confirmation order was untimely because it was not filed within 180 days of the confirmation order as required by **11 U.S.C. § 1330(a)**. Section 1330(a) is the sole authority for revocation of a confirmation order, and **Fed. R. Civ. P. 60(b)**, made applicable by **Fed. R. Bankr. P. 9024** does not apply.

113. ***In re Trudeau*, 237 B.R. 803 (10th Cir. BAP) (Pearson, J.) (before Clark, Bohanon, & Pearson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *motion for rehearing denied,* (10th Cir. BAP Sept. 29, 1999), *appeal dismissed,* No. 99-8096 (10th Cir. filed Feb. 10, 2000).**

A bankruptcy court order holding that an earned income credit was property of the debtor's estate under **11 U.S.C. § 541(a)**, and denying a claimed exemption in the credit under Wyoming law and **15 U.S.C. § 1673** was AFFIRMED.

114. ***Schottler v. Schottler (In re Schottler),* 251 B.R. 441, 1999 WL 766100, KS-99-026 (10th Cir. BAP filed Sept. 28, 1999) (Matheson, J.) (before McFeeley, C.J., and Cornish & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order determining that a debt owed by the debtor to his former spouse was nondischargeable under **11 U.S.C. § 523(a)(15)** was AFFIRMED. The Court refused to address certain issues, finding that they had been **waived on appeal** as they had not been raised below. The Court also refused to consider certain facts which the appellant failed to request that the bankruptcy court take **judicial notice** of under Fed. R. Evid. 201(c).

115. *Peterson v. Student Loan Mktg. Ass'n (In re Peterson),* 251 B.R. 441, 1999 WL 977069,

KS-99-022 (10th Cir. BAP filed Oct. 25, 1999) (Boulden, J.) (before McFeeley, C.J., and Boulden & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).

A bankruptcy court judgment finding certain student loan debts nondischargeable under **11 U.S.C. §§ 523(a)(8) and 1328(a)(2)** was REVERSED. The debts were discharged pursuant to a final order expressly discharging the debts. Although the final discharge order was contrary to §§ 523(a)(8) and 1328(a)(2), the creditor was bound by it because the order was served on the creditor and it failed to timely contest it.

116. ***In re Kopexa Realty Venture Co.*, 240 B.R. 63 (10th Cir. BAP 1999) (McFeeley, C.J.) (before McFeeley, C.J., and Boulden & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

An appeal from a bankruptcy court judgment denying a motion related to the attempted election of a Chapter 7 trustee was DISMISSED because the appellant, a general partner of the debtor who, under **Fed. R. Bankr. P. 9001(5)(B)**, was considered to be the debtor, lacked **standing** to contest the validity of a trustee election. The appellant also had no standing to pursue the appeal as a creditor of the debtor because under **11 U.S.C. § 702(a)(3)** he could not have participated in any election inasmuch as he was an "insider."

117. ***In re Clifton*, 251 B.R. 441, 1999 WL 1018177, EO-99-047 (10th Cir. BAP filed Nov. 4, 1999) (Pusateri, J.) (before Pusateri, Boulden, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A bankruptcy court order confirming the debtor's Chapter 13 plan over the appellant's objection was AFFIRMED. **11 U.S.C. § 1325(a)(3)** was not explicitly raised in the bankruptcy court and, therefore, it could not be considered by the Court on appeal. The case was factually distinguishable from *In re Rasmussen*, 888 F.2d 703 (10th Cir. 1989) (per curiam). Finally, the appellant's argument that **11 U.S.C. § 1325(a)(4)** was not met because he would be paid less under the debtors' confirmed plan than he would in Chapter 7 in light of the fact that his debt would not be dischargeable in a Chapter 7 case was invalid.

118. ***In re Thompson*, 240 B.R. 776 (10th Cir. BAP 1999) (Cornish, J.) (before McFeeley, C.J., and Boulden & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order denying confirmation of the debtor's Chapter 13 plan was AFFIRMED. The order appealed was a "final" order under **28 U.S.C. § 158(a)(1)** inasmuch as it effectively denied a motion to avoid a lien on the debtor's homestead. The debtor was **collaterally estopped** from contesting the validity of a lien in the bankruptcy court where a state court had expressly determined that the agreement giving rise to the lien was valid. The lien in question was not avoidable under **11 U.S.C.**

§ 522(f) because it was not a "judicial lien" as that term is defined under **11 U.S.C. § 101(36)**.

119. ***In re Fox*, 241 B.R. 224 (10th Cir. BAP 1999) (McFeeley, C.J.) (before McFeeley, C.J., and Boulden & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

An appeal from an order denying a motion to convert or dismiss a Chapter 11 case was DISMISSED because the Court lacked appellate jurisdiction. The order appealed was not a "final" order as that term is defined for purposes of **28 U.S.C. § 158(a)(1)** or the **collateral order doctrine,** and it was not an appealable interlocutory order under **28 U.S.C. § 158(a)(3)**. The fact that the order appealed stated that it was entered pursuant to **Fed. R. Bankr. P. 9021** did not make the order a "final" order for purposes of appeal.

120. ***Mather v. BancFirst (In re Guthrie),* 251 B.R. 441, 1999 WL 1127623, EO-99-018 (10th Cir. BAP filed Dec. 9, 1999) (Clark, J.) (before Pusateri, Clark, & Brumbaugh, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A bankruptcy court judgment in favor of the Chapter 7 trustee avoiding certain transfers pursuant to 11 U.S.C. § 547(b) was AFFIRMED. The parties stipulated that all of the elements of § 547(b) had been met, and the bankruptcy court's conclusion that the creditor had not met its burden under **§ 547(c)(2)(B)** was not clearly erroneous. The Court questions, but refuses to resolve in light of the parties' stipulation, whether **§ 547(b)(5)** is met when a creditor is fully secured by non-estate property.

121. ***Adams v. Greenpoint Credit Corp. (In re Earls),* 243 B.R. 101 (10th Cir. BAP 1999) (Pusateri, J.) (before Pusateri, Clark, & Brumbaugh, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma), *aff'd without opinion,* 232 F.3d 901 (10th Cir. filed Oct. 6, 2000).**

A bankruptcy court judgment in favor of the Chapter 7 trustee avoiding a transfer pursuant to 11 U.S.C. § 547(b) was AFFIRMED. Under Oklahoma law, a **mobile home** is a "vehicle" and perfection of an interest therein is accomplished by the filing of a lien entry form, not under the automatic perfection provisions of Article 9 of the Uniform Commercial Code, as adopted in Oklahoma. The creditor's filing of a lien entry form several weeks after the debtor's purchase of the manufactured home and within the 90-day preference period was an avoidable transfer under § 547(b).

122. ***In re Antonich*, 251 B.R. 441, 1999 WL 1295498, WO-99-031 (10th Cir. BAP filed Dec. 14, 1999) (Brumbaugh, J.) (before Pusateri, Clark, & Brumbaugh, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *appeal dismissed,* No. 00-6025 (10th Cir. filed Jan. 19, 2001).**

A bankruptcy court order finding that a creditor's written objection to the confirmation of

the debtor's Chapter 13 plan, filed prior to the expiration of the claims bar date, was not an **informal proof of claim** was AFFIRMED. The bankruptcy court did not abuse its discretion in finding that it would not be equitable to allow the objection to be treated as a timely-filed claim. *Clark v. Valley Fed. Sav. & Loan Ass'n (In re Reliance Equities, Inc.)*, 966 F.23d 1338 (10th Cir. 1992) discussed.

123. ***Rupp v. Christensen (In re Christensen)*, 251 B.R. 441, 1999 WL 1204456, UT-99-036 (10th Cir. BAP filed Dec. 16, 1999) (Bohanon, J.) (before McFeeley, C.J., and Bohanon & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order granting the Chapter 7 trustee summary judgment in an action under 11 U.S.C. § 547(b) was AFFIRMED. A district court ruling setting aside a default judgment in the case did not prevent the case from proceeding under the **collateral order doctrine** inasmuch as the district court's order was not a final decision on the merits of the case. Summary judgment was appropriate as the trustee met his initial burden of showing a lack of a genuine issue of material fact, and the appellant's mere allegations of the existence of a disputed fact were not sufficient under the standards established under **Fed. R. Bankr. P. 7056**. Finally, based on the undisputed facts, the bankruptcy court did not err in avoiding the transfer in question under § 547(b) because under **11 U.S.C. § 547(e)(1)(A)** and Utah law the debtor's transfer of an interest in real property to his spouse occurred at the time that the spouse-appellant recorded the deed, which was during the 90-day preference period.

124. ***In re South Willow Creek Farm*, 251 B.R. 441, 1999 WL 1244511, UT-99-052 (10th Cir. BAP filed Dec. 20, 1999) (Bohanon, J.) (before McFeeley, C.J., and Bohanon & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order dismissing a Chapter 12 case on reduced notice to creditors was REVERSED and the matter was REMANDED. The bankruptcy court abused its discretion under **Fed. R. Bankr. P. 9006(c)(1)** in reducing the 20-day notice period set forth in **Fed. R. Bankr. P. 2002(a)(4)** where the record showed that no evidence of irreparable harm or clear prejudice was presented by the moving party. Three days notice of motion to dismiss a case was not "notice appropriate in the particular circumstances" under **11 U.S.C. § 102(1)** or **due process** standards.

125. ***In re Johnson*, 251 B.R. 441, 2000 WL 104771, WO-99-051 (10th Cir. BAP filed Jan. 31, 2000) (Matheson, J.) (before Pearson, Boulden, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order approving a settlement agreement was AFFIRMED. The automatic stay imposed under **11 U.S.C. § 362** did not prevent the Chapter 7 trustee from prosecuting a prepetition lawsuit, and the lawsuit was not abandoned by the trustee under **11 U.S.C. § 554.** The debtor-appellant failed to provide an **adequate record for review**,

requiring the bankruptcy court's order to be affirmed. Based on the record provided, the bankruptcy court did not abuse its discretion in approving the settlement agreement under **Fed. R. Bankr. P. 9019**. The debtor-appellant's other points of error were **waived on appeal** because he failed to raise them before the bankruptcy court.

126. ***Bailey v. Hazen (In re Ogden)*, 243 B.R. 104 (10th Cir. BAP 2000) (McFeeley, C.J.) (before McFeeley, C.J., and Bohanon & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *rev'd by implication, Bailey v. Big Sky Motors, Ltd. (In re Ogden)*, 314 F.3d 1190 (10th Cir. 2002).**

A bankruptcy court judgment granting the Chapter 7 trustee summary judgment, thereby avoiding a transfer under **11 U.S.C. § 547(b)** and allowing its recovery against the defendant under **11 U.S.C. § 550**, was REVERSED and the matter was REMANDED. The transfer was not totally avoidable under §547(b) because the debtor did not have an interest in all of the funds transferred to the defendant. As to the funds in which the debtor had an interest, the bankruptcy court erred in failing to apply the good faith defense in § 550(b) as the defendant was a subsequent immediate or mediate transferee, rather than an initial transferee. Conduit theory discussed.

127. ***In re Kopexa Realty Venture Co.*, 251 B.R. 441, 2000 WL 148918, KS-99-029 (10th Cir. BAP filed Feb. 11, 2000) (Boulden, J.) (before McFeeley, C.J., and Boulden & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order declaring that certain subleases were terminated as a result of a sale of the debtor's assets authorized pursuant to **11 U.S.C. § 363(f)(4)**, and an order denying a motion for reconsideration under **Fed. R. Bankr. P. 9024** were AFFIRMED. The sale of the debtor's assets, including a prime lease, terminated the prime lease and all subleases related thereto. Interested parties were not entitled to notice of the sale under Kansas foreclosure law, as that law was inapplicable to a § 363(f)(4) sale, and they were not denied **due process** because they had actual notice of the sale. The appeal was an impermissible collateral attack on the final order approving the sale.

128. ***Pratt v. Tower Day Surgery Ctr. (In re Pratt)*, 251 B.R. 441, 2000 WL 159055, WO-99-056 (10th Cir. BAP filed Feb. 15, 2000) (Pearson, J.) (before Clark, Pearson, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *appeal dismissed*, No. 00-6112 (10th Cir. filed May 18, 2000).**

A bankruptcy court judgment avoiding certain physicians' liens in whole and in part under **11 U.S.C. §§ 522(h) and 545(2)** and Oklahoma law was AFFIRMED.

129. ***In re Gregory*, 245 B.R. 171 (10th Cir. BAP) (Robinson, J.) (before Pusateri, Boulden, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *aff'd without opinion*, 246 F.3d 681 (10th Cir. 2000).**

A bankruptcy court order sustaining the Chapter 7 trustee's objection to the debtors' claimed exemption was AFFIRMED. The trustee met his burden under **Fed. R. Bankr. P. 4003(c)** of showing that a pistol was not a "tool of the trade" under Wyoming law.

130. ***In re Albrecht*, 245 B.R. 666 (10th Cir. BAP) (Robinson, J.) (before Pusateri, Boulden, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *aff'd*, 233 F.3d 1258 (10th Cir. 2000).**

A bankruptcy court order denying an application for the allowance of attorney's fees and costs under **11 U.S.C. § 503(b)(1)(A)** and refusing to approve a stipulation related to the application was AFFIRMED. Section 503(b)(1)(A) may not serve as a basis for awarding fees and costs to a professional whose employment is not approved under **11 U.S.C. § 327(a)**. The bankruptcy court did not abuse its discretion in refusing to approve a stipulation between the professional and the United States trustee related to the allowance of the application because the stipulation contravened governing law.

131. ***Groetken v. Davis (In re Davis)*, 246 B.R. 646 (10th Cir. BAP 2000) (Robinson, J.) (before McFeeley, C.J., and Bohanon & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *aff'd in part, vacated in part*, 35 F. App'x 826 (10th Cir. 2002).**

A bankruptcy court judgment holding a debt to be nondischargeable under **11 U.S.C. § 523(a)(2)(A)** and awarding costs to the plaintiff-creditor was AFFIRMED. In ruling that the debt was nondischargeable, the bankruptcy court properly admitted certain evidence objected to by the debtor under Fed. R. Evid. 403. The allowance of costs was summarily affirmed because the debtor-appellate failed to provide an **adequate record for review**. The bankruptcy court's order *sua sponte* imposing sanctions against the debtor under **Fed. R. Bankr. P. 9011** was REMANDED for further proceedings, because the court failed to follow certain procedures meant to afford the debtor **due process**. Finally, the Court dismissed an appeal from the portion of the bankruptcy court's order *sua sponte* imposing sanctions against debtor's counsel, because the law firm was not named on the notice of appeal as required under **Fed. R. Bankr. P. 8001(a)**.

132. ***In re Kwiecinski*, 245 B.R. 672 (10th Cir. BAP 2000) (Pusateri, J.) (before Pusateri, Boulden, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order disallowing the Chapter 13 debtors' claimed homestead exemption in one of two parcels of real property was REVERSED. No objection to the exemption was made in the time provided under **Fed. R. Bankr. P. 4003(b)** and, therefore, the exemption was valid under **11 U.S.C. § 522(l)**. The debtors' claimed exemption was also valid under Wyoming homestead law.

133. ***In re Hamblin*, 251 B.R. 441, 2000 WL 297069, WO-99-059 (10th Cir. BAP filed Mar. 22, 2000) (Matheson, J.) (before McFeeley, C.J., and Boulden & Matheson,**

JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).

A bankruptcy court order imposing **sanctions** against the debtors' counsel was REVERSED. Debtors' counsel's conduct was not so egregious so as to be subject to sanctions, and the bankruptcy court failed to afford counsel **due process**.

134. ***Straight v. Wyo. Dept. of Transp. (In re Straight)*, 248 B.R. 403 (10th Cir. BAP) (Pusateri, J.) (Boulden, J., dissenting) (before Pusateri, Boulden, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *appeal dismissed*, No. 00-8042 (10th Cir. filed Nov. 13, 2000)**.

A bankruptcy court order denying a state entity's motion to dismiss the Chapter 7 debtor's case against it on **sovereign immunity** grounds was REVERSED. The bankruptcy court was not bound under the **law of the case doctrine** by an earlier decision by the United States Court of Appeals of the Tenth Circuit that the state had waived its sovereign immunity under **11 U.S.C. § 106(b)**. Section 106(b) did not apply to the proceeding because the debtor conceded that her postpetition causes of action against the state under **11 U.S.C. §§ 362 and 525(a)** were not property of her Chapter 7 estate, and this concession was supported by **11 U.S.C. § 348(f)(1)**. Furthermore, the state did not waive its sovereign immunity under common law principles of waiver. The law of the case doctrine also did not require the bankruptcy court to adhere to an earlier decision of the United States District Court for the District of Wyoming, holding that **11 U.S.C. § 106(a)** constitutionally abrogates the state's sovereign immunity. Upon independent analysis of new law on the topic, the Court, in a split decision, concluded that § 106(a) is an unconstitutional abrogation of the state's sovereign immunity.

135. ***Parker v. Elkins Welding & Constr., Inc. (In re Elkins Welding & Constr., Inc.)*, 251 B.R. 441, 2000 WL 633223, NM-00-004 (10th Cir. BAP filed May 17, 2000) (Clark, J.) (before Clark, Bohanon, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court of the District of New Mexico)**.

A bankruptcy court order granting a creditor's motion for summary judgment, thereby holding that the creditor's lien in certain vehicles had priority over the lien of a competing lienholder, was REVERSED. Although creditor's interest in the vehicles was noted on their titles, no written security agreement between the debtor and the creditor existed. Thus, the only way the creditor's interest in the vehicles could "attach" under **U.C.C. § 9-203** was by possession. The Court REMANDED the matter to the bankruptcy court to determine if the creditor "possessed" the vehicles in question.

136. ***In re Winters*, 251 B.R. 441, 2000 WL 914181, WY-00-006 (10th Cir. BAP filed June 26, 2000) (Clark, J.) (before Clark, Bohanon, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order sustaining a Chapter 7 trustee's objection to the debtor's

claimed exemption in two rings was REVERSED. The debtor claimed the rings as exempt under Wyo. Stat. Ann. § 1-20-105, which provides that exempt "necessary wearing apparel" may include wedding rings. Although the debtor was not married, it was uncontested that the rings in question were her mother's wedding rings and, therefore, qualified as "wedding rings" that may be exempt under § 1-20-105. The Court REMANDED the matter to the bankruptcy court to determine whether the rings were the debtor's "necessary wearing apparel."

137. ***Chandler v. State of Okla. (In re Chandler)*, 251 B.R. 872 (10th Cir. BAP 2000) (Clark, J.) (Matheson, J., concurring) (before Clark, Robinson, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court order denying the State of Oklahoma's motion to dismiss an action brought against it by the Chapter 7 debtor pursuant to 11 U.S.C. § 523(a) was REVERSED. *Straight v. Wyo. Dep't of Transp. (In re Straight)*, 248 B.R. 403 (10th Cir. BAP 2000) [134], decided after the bankruptcy court's decision in this case, holds that **11 U.S.C. § 106(a)** is not a valid abrogation of the State's **Eleventh Amendment sovereign immunity**. The debtor's § 523(a) action was a "suit" against the State, and there was no record that the State had waived its sovereign immunity under § 106(b) or by common law waiver. Because the debtor was not allowed to proceed against the State, the bankruptcy court erred in denying the State's motion to dismiss. The matter was REMANDED to the bankruptcy court to enter an order dismissing the suit.

138. ***Merrill v. Merrill (In re Merrill)*, 252 B.R. 497 (10th Cir. BAP 2000) (McFeeley, C.J.) (before McFeeley, C.J., and Pusateri & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma, *reported at* 246 B.R. 906), *aff'd*, 15 F. App'x 766 (10th Cir. Aug. 13, 2001).**

A bankruptcy court judgment excepting divorce-related debts from the Chapter 7 debtor's discharge under **11 U.S.C. § 523(a)(4) and (5)** was AFFIRMED. The bankruptcy court did not err in determining that it was **collaterally estopped** by a state court judgment from reconsidering that an investment account was a technical trust, that the debtor was a fiduciary for the beneficiary of the trust, and that he had wrongfully removed money from the trust. Applying these binding factual conclusions, the debt resulting from the debtor's actions with regard to the trust was nondischargeable under § 523(a)(4). Furthermore, pursuant to *Sampson v. Sampson (In re Sampson)*, 997 F.2d 717 (10th Cir. 1993), certain obligations owed to the debtor's former spouse under a state court divorce decree were nondischargeable under § 523(a)(5) because they were intended by the state court to be "support," and the substance of the obligations was in the nature of support at the time of the divorce.

139. ***Tuloil, Inc. v. Shahid (In re Shahid)*, 254 B.R. 40 (10th Cir. BAP 2000) (Robinson, J.) (before Pusateri, Robinson, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

Bankruptcy court orders assessing attorney's fees against the Chapter 7 debtor in an action under **11 U.S.C. § 727** and determining the amount of the fees were REVERSED, and the matter was REMANDED. Admonishing debtor's counsel for failing to comply with **10th Cir. BAP L.R. 8009-1(a)**, the court went on to consider the merits of the appeal. The fees in question were not taxable against the debtor because § 727 does not provide a basis for the allowance of such fees, and there was no contractual basis for the fees. Although the contract in question allowed fees incurred in a suit to collect on the note, the § 727 action was not such a suit.

140. ***In re Hathaway*, 271 B.R. 213, 2000 WL 1634770, EO-00-034 (10th Cir. BAP filed Oct. 18, 2000) (per curiam) (before McFeeley, C.J., and Clark & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

The Chapter 13 debtors' appeal of an order denying their motion to determine tax liability was DISMISSED for lack of jurisdiction inasmuch as the debtors did not file a timely notice of appeal from the order under **Fed. R. Bankr. P. 8002(a)**. The debtors' post-judgment motions were not filed in time to allow for the tolling of Rule 8002(a)'s 10-day period under **Fed. R. Bankr. P. 8002(b)**. The Court AFFIRMED the bankruptcy court's order denying the debtors' motion for rehearing, holding that it did not abuse its discretion in so doing. If the motion was a motion for a new trial under Fed. R. Civ. P. 59, made applicable in bankruptcy under **Fed. R. Bankr. P. 9023**, it was untimely. Alternatively, if the motion was brought pursuant to Fed. R. Civ. P. 60(b), made applicable in bankruptcy under **Fed. R. Bankr. P. 9024**, the debtors failed to plead sufficient grounds for relief thereunder.

141. ***In re K.D. Co., Inc.*, 254 B.R. 480 (10th Cir. BAP 2000) (Boulden, J.) (before Boulden, Robinson, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court order requiring a Chapter 11 debtor's former general counsel to disgorge fees paid to it from the estate to pay the claim of another administrative claimant in accordance with the terms of a confirmed plan was AFFIRMED. The law firm's appeal was not **moot** despite the conversion of the debtor's Chapter 11 case to Chapter 7 because the competing claimant's claim under the confirmed plan survived conversion, and he had the right to recover from the law firm. Disgorgement was proper because the valid confirmed plan so provided, and it was binding on all parties under **11 U.S.C. § 1141** and ***res judicata*** principles. **Due process** issues are also discussed.

142. ***Norwest Bank El Paso v. Van Tol (In re Van Tol)*, 255 B.R. 57 (10th Cir. BAP 2000) (Cornish, J.) (before Bohanon, Boulden, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court judgment holding that a bank had a perfected secured interest in

capital retains issued to the Chapter 11 debtors by the Dairy Farmers of America, Inc. was AFFIRMED. The Dairy Farmers' restrictions on assignment or transfer of the retains were invalid under **U.C.C. § 9-318(4)**, as adopted in New Mexico. In so holding, the Court examined **U.C.C. §§ 9-105 and 9-106**.

143. ***In re Tapia*, 271 B.R. 213, 2000 WL 1707254, KS-00-015 (10th Cir. BAP filed Nov. 15, 2000) (McNiff, J.) (before McFeeley, C.J., and Clark & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order granting a judgment creditor relief from the automatic stay under **11 U.S.C. § 362(d)** to pursue state court litigation against the debtor was AFFIRMED, and a motion for sanctions pursuant to **Fed. R. Bankr. P. 8020** was DENIED.

144. ***Lopez v. Long (In re Long)*, 255 B.R. 241 (10th Cir. BAP 2000) (Boulden, J.) (before Boulden, Cornish, & Matheson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order dismissing the plaintiffs' nondischargeability complaint against the debtor and an order denying the plaintiffs' motions for reconsideration were AFFIRMED. The plaintiff-appellants' notice of appeal was timely under **Fed. R. Bankr. P. 8002(b)** because their post-judgment motions, whether viewed as motions pursuant to **Fed. R. Bankr. P. 9023** (incorporating Fed. R. Civ. P. 59(e) in bankruptcy) or **Fed. R. Bankr. P. 9024** (incorporating Fed. R. Civ. P. 60(b) in bankruptcy), tolled the 10-day period under **Fed. R. Bankr. P. 8002(a)**. Although the Court had jurisdiction to consider the appeal, the plaintiff-appellants failed to provide an adequate record as required under **Fed. R. Bankr. P. 8009(b)** and **10th Cir. BAP L.R. 8009-1(a)**, therefore mandating that the bankruptcy court be affirmed.

145. ***In re Drew*, 256 B.R. 799 (10th Cir. BAP 2001) (Pusateri, J.) (before Pusateri, Bohanon, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order (1) denying the Chapter 7 debtors' motion to strike opposition to their claim objection, (2) allowing three tardily-filed claims of Wyoming Medical Center, and (3) allowing twenty seven claims tardily filed by the Chapter 7 trustee, was AFFIRMED in part and REVERSED in part. The portion of the order denying the motion to strike was summarily affirmed because the bankruptcy court did not err in holding that the Chapter 7 trustee had standing to be heard on matters concerning the allowance or disallowance of claims. The portion of the order allowing the Medical Center's late-filed claims was also affirmed because such claims are allowed under **11 U.S.C. §§ 502(b)(9) and 726(a)(3)**. The bankruptcy court erred, however, in allowing the trustee's late-filed claims because §§ 502(b)(9) and 726(a)(2) and (3) only apply to claims filed late by creditors under **11 U.S.C. § 501(a)**. Claims, such as those filed by the trustee under **11 U.S.C. § 501(c)**, may not be allowed if they filed late. **Fed. R.**

Bankr. P. 3002 and 3004 are discussed.

146. ***In re Fross*, 271 B.R. 213, 2000 WL 1902000, KS-00-028 (10th Cir. BAP filed Dec. 22, 2000) (Michael, J.) (before McFeeley, C.J., and Clark & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *appeal dismissed*, No. 01-3005 (10th Cir. filed Jan. 11, 2002).**

A bankruptcy court order dismissing the debtors' Chapter 11 case was AFFIRMED. It was uncontested that the debtors could not propose a plan that complied with the absolute priority rule as interpreted in *In re Fross*, 233 B.R. 176, 1999 WL 26886, KS-98-030 (10th Cir. BAP Jan. 15, 1999) [82]. The Court could not overturn *Fross*, and it was binding on the Court under the **law of the case doctrine**. Thus, the bankruptcy court's dismissal of the case was proper.

147. ***Manchester v. First Bank & Trust Co. (In re Moses)*, 256 B.R. 641 (10th Cir. BAP 2000) (Clark, J.) (before McFeeley, C.J., and Clark & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma)**.

A bankruptcy court order denying a bank's motion for summary judgment and granting the trustee's motion for summary judgment in a **11 U.S.C. § 547(b)** action was AFFIRMED. The transfer in question was a "transfer of an interest of the debtor in property" within the meaning of § 547(b). The **earmarking doctrine** never applies in a § 547(b) analysis, unless a co-debtor provides funds to the debtor to pay a co-debt. Even if the doctrine is applicable, the bankruptcy court did not err in rejecting it because the estate was diminished by the transfer and the debtor controlled the funds that were transferred. The bankruptcy court also did not err in rejecting the defendant's **11 U.S.C. § 547(c)(1)** defense, because no new value as defined in **11 U.S.C. § 547(a)(2)** was provided, and the parties did not intend the transfer to be a contemporaneous exchange for new value.

148. ***Morris v. Vulcan Chem. Credit Union (In re Rubia)*, 257 B.R. 324 (10th Cir. BAP) (Clark, J.) (McFeeley, C.J., dissenting) (before McFeeley, C.J., and Clark & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *aff'd*, 23 F. App'x 968 (10th Cir. 2001).**

A bankruptcy court order dismissing a Chapter 7 trustee's complaint for turnover was AFFIRMED. The trustee had no action against a credit union for turnover of postpetition payments that the debtor had made to the credit union on an exempt vehicle. Although the credit union's lien on the vehicle was avoided and preserved for the benefit of the estate under **11 U.S.C. § 551**, the trustee could not collect the credit union's debt. Avoidance and preservation of the credit union's lien only gave the trustee the lien position held by the credit union. The value of the lien position for the estate was measured by the value of the vehicle, limited to the amount of the debtor's debt to the credit union on the petition date.

149. ***Duty v. White (In re White)*, 271 B.R. 213, 2001 WL 52852, KS-00-039 (10th Cir. BAP filed Jan. 23, 2001) (McFeeley, C.J.) (before McFeeley, C.J., and Clark & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *appeal dismissed*, No. 01-3115 (10th Cir. filed Nov. 7, 2001).**

A bankruptcy court judgment granting a creditor's motion for summary judgment and holding a debt to be nondischargeable under **11 U.S.C. § 523(a)(4)** was AFFIRMED, but another related judgment calculating the amount of the debt was REVERSED and REMANDED. The debtor-attorney's failure to reduce his contingency fee payment from a structured settlement to present value resulted in a nondischargeable debt under § 523(a)(4), even though the debtor did not understand that he was required to reduce his fee. The debtor was a fiduciary under § 523(a)(4) because the Kansas Rules of Professional Conduct impose a technical trust when an attorney is entrusted with a client's funds, and the debtor committed a defalcation by recklessly or negligently failing to reduce his fee to present value.

150. ***In re Fross*, 258 B.R. 26 (10th Cir. BAP 2001) (per curiam) (before McFeeley, C.J., and Clark & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

The Court entered an order granting a motion to stay the mandate pursuant to **10th Cir. BAP L.R. 8016-3(b)** and a motion for stay pending appeal to the United States Court of Appeals of the Tenth Circuit pursuant to **Fed. R. Bankr. P. 8017(b)**. The Court had jurisdiction to consider the motions despite the fact that the appellant had filed a notice of appeal with the Tenth Circuit. The motion for stay pending appeal was unopposed and, therefore, such a stay was appropriate. The Court also stayed the mandate because the issue appealed was substantial and there was good cause for the stay.

151. ***Parker v. Elkins Welding & Constr., Inc. (In re Elkins Welding & Constr., Inc.)*, 258 B.R. 216 (10th Cir. BAP 2001) (Clark, J.) (before Clark, Bohanon, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court order granting a bank summary judgment in an action to determine the validity, priority and extent of competing liens was AFFIRMED. The competing creditor's interest in the debtor's vehicles did not attach because there was no written security agreement, and the debtor did not possess the vehicles within the meaning of **N.M. Stat. Ann. §§ 55-9-203 and 55-9-305**. Absent attachment, the creditor's interest was unperfected and, therefore, the bank's interest in the vehicles was superior.

152. ***In re Inkster*, 271 B.R. 213, 2001 WL 169758, WO-00-063 (10th Cir. BAP filed Feb. 21, 2001) (Boulden, J.) (before Pusateri, Boulden, & Krieger, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order vacating its earlier order allowing a creditor an extension of time to file a 11 U.S.C. § 523(a) complaint against the debtors was AFFIRMED. The

appellant-creditor failed to provide the Court with an **adequate record for review** and, therefore, there were grounds for summarily affirming the bankruptcy court. Even on the poor record, however, the Court determined that the bankruptcy court did not abuse its discretion in concluding that under **Fed. R. Bankr. P. 4007(c)** "cause" for extending the deadline for filing a § 523(a) complaint did not exist. The creditor had not attended the debtors' meeting of creditors or conducted discovery, and it did not cite any authority for the proposition that the debt in question was subject to exception from discharge.

153. ***Countryman v. Zimmerle (In re Zimmerle)*, 271 B.R. 213, 2001 WL 227414, UT-99-075 (10th Cir. BAP filed Mar. 8, 2001) (Pusateri, J.) (before Pusateri, Cornish, and Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court judgment granting the debtor's motion for summary judgment and dismissing a complaint brought pursuant to 11 U.S.C. §§ 523(a) and 727 was AFFIRMED. The appellant-creditor failed to provide an **adequate record for review**, thereby providing grounds for the Court to summarily affirm the bankruptcy court.

154. ***In re Geneva Steel Co.*, 260 B.R. 517 (10th Cir. BAP 2001) (Michael, J.) (before Pusateri, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *aff'd*, 281 F.3d 1173 (10th Cir. 2002).**

A bankruptcy court order refusing to grant a creditor a continuance, and disallowing in part and subordinating in part the creditor's claim against the Chapter 11 debtor was AFFIRMED. The creditor, a holder of notes issued by the debtor, filed a proof of claim against the debtor based on his ownership of the notes and his claim against the debtor for fraud related to the investment. The indenture trustee for the notes also filed a proof of claim on behalf of all note holders based on their ownership of the notes. The bankruptcy court did not err in subordinating the creditor's fraud claim under **11 U.S.C. § 510(b)**. The creditor was a purchaser of the notes under **11 U.S.C. § 101(4) and Utah Code Ann. § 70A-1-201(32)**. The bankruptcy court also did not err in disallowing the portion of the creditor's claim based on ownership of the notes to the extent that it duplicated the claim of the indenture trustee. That the debtor did not present evidence in objecting to the creditor's claim based on ownership of the notes did not make the claim allowable. An objection to a proof of claim under **11 U.S.C. § 502(b)** raising only legal issues is sufficient. Finally, the bankruptcy court did not abuse its discretion in refusing to grant the creditor a continuance.

155. ***In re Tuttle*, 271 B.R. 213, 2001 WL 331971, KS-00-074 (10th Cir. BAP filed Apr. 5, 2001) (Bohanon, J.) (before McFeeley, C.J., and Clark & Bohanon, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas, *reported at* 259 B.R. 735 (2000)), *aff'd*, 291 F.3d 1238 (10th Cir. 2002).**

A bankruptcy court order holding the debtor personally liable for interest that accrued on a tax claim postpetition but prior to the confirmation of her Chapter 11 plan was

AFFIRMED. Such "gap interest" is a tax liability that is nondischargeable under **11 U.S.C. §§ 507(a)(8), 523(a)(1)(A) and 1141(d)(2)**. The Internal Revenue Service was not barred from seeking collection of the nondischargeable gap interest from the debtor outside of the confirmed plan, even though the plan expressly stated that the debtor had satisfied all of her tax obligations thereunder. Finally, the Court refused to prevent the IRS from collecting the gap interest under **11 U.S.C. § 105**.

156. ***In re Black*, 271 B.R. 213, 2001 WL 359580, UT-00-026 & UT-00-030 (10th Cir. BAP filed Apr. 11, 2001) (Cornish, J.) (before Pusateri, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

Bankruptcy court orders disallowing in large part a proof of claim filed by the debtor's divorce attorney for unpaid prepetition fees and costs and confirming the debtor's Chapter 13 plan was REVERSED and the matter was REMANDED. The bankruptcy court erred in admitting **parol evidence** related to the debtor's understanding of the parties' unambiguous fee agreement. Furthermore, the bankruptcy court erred in ordering the attorney to collect from the debtor's former spouse the difference of the amount allowed by the divorce court and the amount allowed in the bankruptcy court. Under Utah law, an attorney may not collect fees from the spouse, but rather must act through his or her client.

157. ***In re Flores*, 271 B.R. 213, 2001 WL 543677, NM-00-069 (10th Cir. BAP filed May 23, 2001) (Robinson, J.) (before Bohanon, Boulden, & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court order denying the debtor's motion to reopen his dismissed Chapter 7 case pursuant to **11 U.S.C. § 350(b)** was VACATED and the matter was REMANDED. Although the bankruptcy court did not abuse its discretion in ruling on the debtor's motion without a hearing, the court did not provide any findings or conclusions related to its denial of the motion making appellate review impossible.

158. ***In re Boldridge*, 292 B.R. 711, 2001 WL 604190, KS-01-005 (10th Cir. BAP filed June 4, 2001) (Bohanon, J.) (before McFeeley, C.J., and Clark & Bohanon, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order denying the Chapter 7 debtor's motion to avoid a lien was AFFIRMED. A warehouseman's lien held by the creditors was possessory and, therefore, **11 U.S.C. § 522(f)** did not apply. Furthermore, the bankruptcy court did not abuse its discretion in denying the debtor's motion for rehearing, whether that motion was viewed as a motion pursuant to Fed. R. Civ. P. 59, made applicable in bankruptcy under **Fed. R. Bankr. P. 9023**, or Fed. R. Civ. P. 60(b), made applicable in bankruptcy under **Fed. R. Bankr. P. 9024**.

159. ***Cadle Co. v. Stewart (In re Stewart)*, 263 B.R. 608 (10th Cir. BAP 2001) (Clark, J.) (before McFeeley, C.J., and Clark & Bohanon, JJ.) (Appeal from the United States**

Bankruptcy Court for the District of Kansas), *aff'd*, 35 F. App'x 811 (10th Cir. 2002).

A bankruptcy court judgment refusing to deny the debtors a discharge under **11 U.S.C. § 727(a)(2)(A), (a)(3), (a)(4)(A) and (a)(5)** was not clearly erroneous and, therefore, it was AFFIRMED.

160. ***In re Blagg*, 271 B.R. 213, 2001 WL 725993, NO-01-006 (10th Cir. BAP filed June 28, 2001) (per curiam) (before Boulden, Robinson, & Krieger, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma), *aff'd*, 43 F. App'x 266 (10th Cir. 2002).**

On remand from this Court, *see* *In re Blagg*, 223 B.R. 795 (10th Cir. BAP 1998) [69] ("*Blagg I*"), the bankruptcy court entered an order awarding the Chapter 7 trustee attorney's fees and costs under **Fed. R. Bankr. P. 9011** resulting from the filing of the debtors' case in an improper venue. The debtors sought reconsideration of the fee order, and for relief from the bankruptcy court's original judgment dismissing their case for improper venue. The bankruptcy court refused to reconsider the fee order or to vacate its order of dismissal, and the debtors again appealed. This Court AFFIRMED. First, drawing on the definition of "party in interest" under **11 U.S.C. § 1109(b)**, the Court held that the Chapter 7 trustee was a "party in interest" with standing to object to the venue of the debtors' case under **Fed. R. Bankr. P. 1014(a)(2)**. Second, the bankruptcy court did not abuse its discretion in dismissing the debtors' case without prejudice to them refiling the case in a district with venue. Third, *Blagg I* was **law of the case**, and no exceptions to that doctrine were applicable. Fourth, the bankruptcy court did not abuse its discretion in issuing its fee order. Finally, the bankruptcy court did not abuse its discretion in denying the debtors' motion to vacate the dismissal order under Fed. R. Civ. P. 60(b), made applicable in bankruptcy under **Fed. R. Bankr. P. 9024**.

161. ***In re Parker*, 264 B.R. 685 (10th Cir. BAP 2001) (McFeeley, C.J.) (before McFeeley, C.J., and Clark & Bohanon, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *aff'd*, 313 F.3d 1267 (10th Cir. 2002), *cert. denied*, 540 U.S. 965 (2003).**

A bankruptcy court order reopening a Chapter 7 debtor's no asset case and declaring that a previously unscheduled debt for legal malpractice was discharged was AFFIRMED. The bankruptcy court did not err in refusing to apply doctrines of laches or equitable estoppel to bar the reopening of the debtor's case under **11 U.S.C. § 350(b)** approximately two years after it was closed. Furthermore, notwithstanding **11 U.S.C. § 523(a)(3)(A)**, the unscheduled prepetition debt was automatically discharged under **11 U.S.C. § 727(b)** in the debtor's no asset case where no claims bar date was set. Equitable considerations did not impact the automatic discharge of the debt, and the debt would only be excepted from discharge if the creditor proved the application of **11 U.S.C. § 523(a)(3)(B)**. In rejecting the debtor's argument that her claim arose postpetition and, therefore, was not discharged, the Court adopted the majority view that

a claim under **11 U.S.C. § 101(5)** arises at the time of the debtor's conduct that gives rise to the claim. Since the debtor's malpractice occurred prepetition, the creditor's claim was a discharged, prepetition claim. Finally, the bankruptcy court did err in refusing to except the unscheduled debt from discharge under § 523(a)(3)(B), because the creditor failed to prove that the debt was nondischargeable under **11 U.S.C. § 523(a)(2), (4) or (6)**.

162. ***In re Iverson*, 271 B.R. 213, 2001 WL 863444, NM-01-018 (10th Cir. BAP filed July 31, 2001) (Michael, J.) (before Boulden, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico), *appeal dismissed*, No. 01-2277 (10th Cir. filed Jan. 2, 2002).**

A bankruptcy court order allowing the debtor's former spouse a priority claim under **11 U.S.C. § 507(a)(7)** was not clearly erroneous and, therefore, was AFFIRMED. Established Tenth Circuit law defining a "support" debt under § 507(a)(7) is applied, and such law allows a bankruptcy court to consider **parol evidence** in determining whether a debt created by a divorce agreement is "support." The Court refused to consider the appellant's estoppel argument, concluding that it was **waived on appeal** as a result of not being raised before the bankruptcy court.

163. ***Carter-Waters Okla., Inc. v. Bank One Trust Co., N.A. (In re Eufaula Indus. Auth.)*, 266 B.R. 483 (10th Cir. BAP 2001) (Boulden, J.) (before Pusateri, Boulden, & Krieger, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A bankruptcy court judgment dismissing a complaint under **11 U.S.C. § 510(c)** without prejudice was AFFIRMED. The plaintiffs failed to show that the defendant-claimant had engaged in inequitable conduct and, therefore, they had no cause of action under § 510(c) as a matter of law. The degree of wrongful conduct required to be shown for insider and non-insider defendants is discussed.

164. ***In re Nichols*, 265 B.R. 831 (10th Cir. BAP 2001) (Robinson, J.) (before McFeeley, C.J., and Clark & Robinson, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order denying the Chapter 7 debtor's motion seeking to avoid a lien under **11 U.S.C. § 522(f)(1)(A)** was AFFIRMED. Section 522(f)(1)(A) did not apply because the interest sought to be avoided was not a "judicial lien" as defined under **11 U.S.C. § 101(36)**, but rather a "security interest" under **11 U.S.C. § 101(51)**.

165. ***Sloan v. Tirey (In re Tirey)*, 271 B.R. 213, 2001 WL 963996, EO-01-025 (10th Cir. BAP filed Aug. 24, 2001) (Pusateri, J.) (before McFeeley, C.J., and Pusateri & Krieger, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A bankruptcy court order denying a debtor a discharge under 11 U.S.C. § 727(a)(4) and (a)(7) was VACATED and the case was REMANDED for additional findings of fact and conclusions of law. The bankruptcy court's order was incapable of review because the court failed to make findings of fact and conclusions of law as required under Fed. R. Civ. P. 52(a), made applicable in bankruptcy under **Fed. R. Bankr. P. 7052**.

166. ***Lowther v. Lowther (In re Lowther),* 266 B.R. 753 (10th Cir. BAP 2001) (Robinson, J.) (before Pusateri, Robinson, & Krieger, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *aff'd,* 321 F.3d 946 (10th Cir. 2002).**

A bankruptcy court order excepting the debtor's obligation to a former spouse for divorce-related attorney's fees from discharge under **11 U.S.C. § 523(a)(5)** was REVERSED. Although fees awarded in custody disputes are generally nondischargeable under § 523(a)(5) and *Jones v. Jones (In re Jones)*, 9 F.3d 878 (10th Cir. 1993), "unusual circumstances" existed to discharge the fee debt. The debtor was ordered to pay her former spouse's attorney's fees in a custody dispute in which she was awarded custody of the couple's minor child. Requiring the debtor to pay the fee debt would impair her ability to support the child.

167. ***In re Buckner*, 271 B.R. 213, 2001 WL 992063, EO-00-073 (10th Cir. BAP filed Aug. 30, 2001) (Pusateri, J.) (before Pusateri, Boulden, & Krieger, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A bankruptcy court order allowing the Chapter 13 trustee to examine the debtors under **Fed. R. Bankr. P. 2004** was AFFIRMED. The Rule 2004 examination order was a "final order" for purposes of appellate jurisdiction under **28 U.S.C. § 158(a)(1)** where the examination was to be conducted after the confirmation of a Chapter 13 plan and no further action by the bankruptcy court was expected. Although there were issues as to the order appealed, the timeliness of the appeal under **Fed. R. Bankr. P. 8002** and the ***pro se* debtors'** failure to provide an **adequate record for review**, the order that was timely appealed, denying a motion to limit the scope of a Rule 2004 examination, was not an abuse of the bankruptcy court's discretion in light of the broad scope of examinations permitted under Rule 2004.

168. ***Brasher v. Turner (In re Turner),* 266 B.R. 491 (10th Cir. BAP 2001) (Krieger, J.) (before Pusateri, Boulden, & Krieger, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order refusing to except a debt for divorce-related attorney's fees from the Chapter 7 debtor's discharge under **11 U.S.C. § 523(a)(5)** was AFFIRMED. The bankruptcy court applied the correct burden of proof under § 523(a)(5), and it did not abuse its discretion in refusing to admit certain billing records that had not been provided to opposing counsel prior to trial. The bankruptcy court also did not err in refusing to except the debt from discharge, because its conclusion that the appellant failed to prove

that the divorce court's attorney fee award was related to a custody dispute and, thus, a debt in the nature of "support," was not clearly erroneous.

169. ***Wardrip v. Hart (In re Hart)*, 271 B.R. 213, 2001 WL 1095321, KS-01-019 (10th Cir. BAP filed Sept. 19, 2001) (Michael, J.) (before Clark, Bohanon, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order denying a plaintiff's motion for summary judgment under **Fed. R. Bankr. P. 7056**, and a judgment dismissing the plaintiff's complaint filed pursuant to **11 U.S.C. § 727(a)(2)(A) and (a)(4)** were AFFIRMED. The Court admonished plaintiff-appellant for failing to reference specific parts of the record supporting her claims of error. However, upon reviewing the record, the Court concluded that the bankruptcy court did not err in denying the plaintiff's summary judgment motion because factual issues related to the debtor's intent existed. The bankruptcy court also did not err in denying the plaintiff judgment under § 727(a)(2)(A) and (a)(4), because it applied the correct law and its findings of fact were not clearly erroneous.

170. ***In re Haworth*, BAP No. WY-01-075 (10th Cir. BAP filed Nov. 7, 2001) (before Pusateri, Bohanon, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *appeal dismissed for lack of prosecution*, No. 02-8001 (10th Cir. filed Mar. 28, 2002).**

An appeal from a bankruptcy court order denying the debtor's motion to dismiss her Chapter 7 case was DISMISSED for lack of jurisdiction under **28 U.S.C. § 158(a)**, because the order was not a "final" order, and leave to appeal the interlocutory order was not appropriate.

171. ***In re Miranda*, 285 B.R. 344, 2001 WL 1538003, NM-01-044 (10th Cir. BAP filed Dec. 4, 2001) (Robinson, J.) (before Bohanon, Robinson, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

Bankruptcy court orders denying a Chapter 13 trustee's request for fees under **28 U.S.C. § 586(e)** on payments made in cases that had been dismissed or converted prior to confirmation was AFFIRMED. **11 U.S.C. § 1326(a) and (b)** mandate that all pre-confirmation payments received by the Chapter 13 trustee, less administrative expenses, be returned to the debtor upon dismissal or conversion of a case. Fees allowed under § 586(e) are not administrative expenses under **11 U.S.C. § 506(b)**. The Court contrasts § 1326 with **11 U.S.C. § 1226(a)**, which expressly allows the Chapter 12 trustee to deduct non-administrative expense fees from payments received pre-confirmation.

172. ***Zubrod v. Kelsey (In re Kelsey)*, 270 B.R. 776 (10th Cir. BAP 2001) (Krieger, J.) (before Boulden, Cornish, & Krieger, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court judgment avoiding the Chapter 7 debtor's prepetition transfer of cash from a joint bank account to his nondebtor spouse under **11 U.S.C. § 548(a)(1)(B)** was AFFIRMED. The cash withdrawn from the joint bank account and transferred to the nondebtor spouse was a transfer of property of the debtor. Also, the bankruptcy court did not err in determining that the nondebtor spouse failed to give "value" for the transfer within the meaning of **11 U.S.C. § 548(d)(2)(A)**. Finally, the appellate record supported avoiding transfer under **11 U.S.C. § 548(a)(1)(A)**, because the undisputed facts showed that the transfer was made with an intent to hinder, delay, or defraud creditors.

173. ***In re Swanson*, 285 B.R. 344, 2001 WL 1640009, WY-01-021 (10th Cir. BAP filed Dec. 21, 2001) (Cornish, J.) (before Boulden, Cornish, & Krieger, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order denying a motion to modify the automatic stay was AFFIRMED because the appellant failed to provide the Court with an **adequate record for review**.

174. ***In re Duncan*, 271 B.R. 196 (10th Cir. BAP 2002) (Boulden, J.) (before Boulden, Cornish, & Krieger, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *rev'd*, 329 F.3d 1195 (10th Cir. 2003).**

A bankruptcy court order requiring the Chapter 7 trustee to turn over $10,000 to the debtor pursuant to the debtor's valid homestead exemption under Wyoming law was AFFIRMED. **11 U.S.C. § 522(g)(1)** did not bar the debtor from claiming a homestead exemption, even though the trustee avoided the debtor's prepetition transfer of the homestead property to himself and his nondebtor spouse as tenants in the entireties as a fraudulent transfer, because the trustee did not "recover" the debtor's separate, undivided interest in the entireties property under 11 U.S.C. § 550. The Court discusses the debtor's interest in property held as a tenant by the entireties, noting that such interest is property of the estate under **11 U.S.C. § 541(a)(1)**.

175. ***In re Midkiff*, 271 B.R. 383 (10th Cir. BAP 2002) (Cornish, J.) (before Boulden, Cornish, & Krieger, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *aff'd*, 342 F.3d 1194 (10th Cir. 2003).**

Bankruptcy court orders vacating the Chapter 13 debtors' discharge and allowing the Chapter 13 trustee to treat a postpetition federal income tax refund as disposable income were AFFIRMED. Although **Fed. R. Bankr. P. 7001(4)** requires the commencement of an adversary proceeding to revoke a discharge under **11 U.S.C. § 1328(e)**, an adversary proceeding need not be commenced if a discharge entered by mistake is vacated pursuant to **Fed. R. Bankr. P. 9024**. The debtors' discharge was mistakenly entered and thus could be vacated under Rule 9024, because it was entered prior to the debtors' receipt of the tax refund which their confirmed plan stated would be distributed to creditors. The refund was property of the estate under **11 U.S.C. § 1306(a)**, and it was subject to distribution under the terms of the confirmed plan. The debtors were bound by the

confirmed plan under **11 U.S.C. § 1327(a)**, and the refund was disposable income under **11 U.S.C. § 1325(b)(1)(B)**.

176. ***In re Hough*, 285 B.R. 344, 2002 WL 518687, WO-01-059 (10th Cir. BAP filed Jan. 8, 2002) (Clark, J.) (before McFeeley, C.J., and Pusateri & Clark, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *appeal voluntarily dismissed*, No. 02-6048 (10th Cir. filed June 18, 2003).**

A bankruptcy court order granting the Chapter 13 debtor's former spouse relief from stay under **11 U.S.C. § 362(d)** to seek enforcement of a divorce court judgment was AFFIRMED. The bankruptcy court did not abuse its discretion in determining that "cause" existed to lift the automatic stay.

177. ***Cobb v. Lewis (In re Lewis)*, 271 B.R. 877 (10th Cir. BAP 2002) (McFeeley, C.J.) (before McFeeley, C.J., and Clark & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order allowing judgment creditors to amend their complaint under **Fed. R. Bankr. P. 7015** to add a cause of action under **11 U.S.C. § 523(a)(2)(A)** was AFFIRMED, but the bankruptcy court's summary judgment excepting the creditors' debt from discharge was REVERSED. The summary judgment was entered in error because **collateral estoppel** did not bar the debtor from relitigating whether a state court judgment should be excepted from discharge under § 523(a)(2)(A). Relying on **28 U.S.C. § 158(a)(3)**, **Fed. R. Bankr. P. 8001(b)** and **8003(c)**, the Court granted the creditors leave to appeal the interlocutory order allowing them permission to amend their complaint. The bankruptcy court did not abuse its discretion in allowing the creditors to amend their complaint under Rule 7015, because the debtor was not prejudiced by the addition of the § 523(a)(2)(A) cause of action which arose out of the same facts as the causes of action originally plead by the creditors.

178. ***In re Morgan*, 285 B.R. 344, 2002 WL 191995, WO-01-070 (10th Cir. BAP filed Feb. 7, 2002) (Pusateri, J.) (before McFeeley, C.J., and Pusateri & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order avoiding pursuant to **11 U.S.C. § 522(f)(1)(B)** a nonpossessory, nonpurchase-money security interest in tools of the trade claimed to be exempt under Oklahoma law was REVERSED and the matter was REMANDED. The bankruptcy court erred in avoiding the secured creditors' lien prior to ruling on its objection to the Chapter 7 debtors' claimed exemption which was timely filed under **Fed. R. Bankr. P. 4003(b)**. The secured creditor had not waived its argument based on the exemption objection on appeal by failing to first seek reconsideration of the bankruptcy court's judgment under Fed. R. Civ. P. 59, made applicable in bankruptcy under **Fed. R. Bankr. P. 9023**.

179. ***In re Lowther*, 285 B.R. 344, 2002 WL 199836, WO-01-081 (10th Cir. BAP filed Feb.**

8, 2002) (Clark, J.) (before McFeeley, C.J., and Pusateri & Clark, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *aff'd*, 52 F. App'x 476 (10th Cir. 2002).

A bankruptcy court order denying the Chapter 7 debtor's application seeking a contempt citation against her former spouse for violating her discharge by seeking enforcement of a prepetition lien against homestead property was AFFIRMED. The former spouse's lien on the homestead was not affected by the debtor's discharge under **11 U.S.C. § 727(b)**, which only discharges prepetition "debts." Furthermore, the spouse's acts to enforce the lien were not a violation of **11 U.S.C. § 524(a)(2)**, which only enjoins acts to collect a discharged debt as a personal liability of the debtor, not a lienholder's *in rem* action against property securing a lien. The spouse's failure to perfect his lien under Oklahoma law and to file a proof of claim in the debtor's Chapter 7 case did not affect the existence and validity of his lien. A lien will not be void under **11 U.S.C. § 506(d)** due solely to the lack of a filed proof of claim, and a secured creditor is not required to file a proof of claim under **Fed. R. Bankr. P. 3002(a)**. Other arguments related to the validity of the spouse's lien were rejected, including that the spouse was required to object to the debtor's claimed homestead exemption in the property. Under **11 U.S.C. § 522(c)**, property subject to a lien, even if exempt, is liable for a prepetition debt, unless the lien is avoided. No action to avoid the spouse's lien had been commenced at the time that the bankruptcy court entered its order.

180. ***Sloan v. Tirey (In re Tirey)*, 285 B.R. 344, 2002 WL 499296, EO-01-025 (10th Cir. BAP filed Mar. 26, 2002) (Pusateri, J.) (before McFeeley, C.J., and Pusateri & Clark, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

After remand from this Court, *see* *Sloan v. Tirey (In re Tirey)*, 271 B.R. 213, 2001 WL 963996, EO-01-025 (10th Cir. BAP Aug. 24, 2001) [165], the bankruptcy court supplemented its findings of fact and conclusions of law in support of its judgment denying the debtor's discharge under **11 U.S.C. § 727(a)(4) and (a)(7)**. This supplemented judgment was AFFIRMED, because the bankruptcy court applied the correct law and its findings of fact were not clearly erroneous.

181. ***Armstrong v. Potter (In re Potter)*, 285 B.R. 344, 2002 WL 463704, UT-01-27 (10th Cir. BAP filed Mar. 27, 2002) (Michael, J.) (before Pusateri, Bohanon & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

The Court RETAINED JURISDICTION over the appeal and REMANDED the case to the bankruptcy court for the limited purpose of entering an order on a motion for reconsideration. The motion for reconsideration, that was filed within ten days of a minute entry dismissing an adversary proceeding, was treated as a motion for a new trial under Fed. R. Civ. P. 59, made applicable in bankruptcy under **Fed. R. Bankr. P. 9023**. The bankruptcy court entered a separate, final order dismissing the adversary proceeding after the filing of the motion for reconsideration, but did not address the post-minute

entry motion. The Court, therefore, remanded the case to the bankruptcy court to allow it to rule on the motion for reconsideration prior to ruling on the merits of the appeal. The effect that post-judgment motions have on the timing of an appeal under **Fed. R. Bankr. P. 8002(b)** is discussed. *See* Armstrong v. Potter (In re Potter), 292 B.R. 711, 2002 WL 31802978, UT-01-027 (10th Cir. BAP Oct. 8, 2002), *appeal dismissed*, 101 F. App'x 770 (10th Cir. 2004) [202].

182. ***In re Armstrong*, 285 B.R. 344, 2002 WL 471332, UT-01-39 (10th Cir. BAP filed Mar. 28, 2002) (Bohanon, J.) (before Pusateri, Bohanon, & Michael, JJ.) (Appeal from the United States District Court for the District of Utah), *aff'd*, 99 F. App'x 210 (10th Cir. 2004).**

A bankruptcy court order overruling objections to and approving a settlement agreement entered into by the Chapter 11 trustee for the debtor and the Chapter 7 trustee in the case of an affiliated debtor-partnership was AFFIRMED. The bankruptcy court properly considered the factors necessary to approve a settlement agreement under **Fed. R. Bankr. P. 9019** and did not abuse its discretion in approving the settlement agreement proposed by the trustees.

183. ***State of Mo. v. Audley (In re Audley)*, 275 B.R. 383 (10th Cir. BAP 2002) (McFeeley, C.J.) (before McFeeley, C.J., and Cornish & Cordova, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas, *reported at* 268 B.R. 279 (2001)).**

A bankruptcy court summary judgment excepting a debt from discharge under **11 U.S.C. § 523(a)(2)(A)** was AFFIRMED. The Chapter 7 debtor was barred under the **collateral estoppel doctrine** from relitigating the dischargeability of a prepetition state court judgment holding the debtor liable for violations of Missouri's consumer protection statutes. Review of the constitutionality of the state court judgment was barred under the ***Rooker-Feldman* doctrine**.

184. ***In re Anderson*, 275 B.R. 922 (10th Cir. BAP 2002) (Cornish, J.) (Cordova, J., concurring) (before McFeeley, C.J., and Cornish & Cordova, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order disallowing a creditor who filed an untimely proof of claim a distribution in the case was REVERSED. Although tardy, the creditor's proof of claim was filed before the Chapter 7 trustee "commenced distribution" within the meaning of **11 U.S.C. § 726(a)(1)** inasmuch as it was filed prior to the entry of an order approving the trustee's final report.

185. ***Kelaidis v. Cmty. First Nat'l Bank (In re Kelaidis)*, 276 B.R. 266 (10th Cir. BAP 2002) (Pusateri, J.) (before Pusateri, Bohanon, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *appeal voluntarily dismissed*, No. 02-4071 (10th Cir. filed June 3, 2002).**

A bankruptcy court judgment disallowing a creditor's claim against the Chapter 13 debtors was AFFIRMED. The debtors, who had guarantied an insider corporation's debts to the lender-creditor, were not liable for a deficiency claim resulting from the lender's commercially unreasonable sale of collateral. Under Utah law, the commercially unreasonable sale barred the lender from asserting a deficiency claim and from foreclosing against the debtors' real property. The debtor-guarantors were not barred from attacking the reasonableness of the sale under the Utah version of **Uniform Commercial Code § 3-605** because they were not accommodation makers of the underlying note. Even if the debtors were accommodation makers, they had the right to attack the reasonableness of the sale under Utah's version of **Uniform Commercial Code §§ 9-501(3)(b) and 9-504(3)**.

186. ***Carbaugh v. Carbaugh (In re Carbaugh)*, 278 B.R. 512 (10th Cir. BAP 2002) (McFeeley, C.J.) (before McFeeley, C.J., and Cornish & Cordova, JJ) (Appeal from the United States District Court for the District of Kansas).**

A bankruptcy court order granting the debtor's former spouse relief from the automatic stay to continue state court litigation against the debtor to determine her ownership rights in certain retirement plans, and an order sustaining objections by the spouse and the Chapter 7 trustee to the debtor's claimed exemption in the retirement plans and an investment account was AFFIRMED. The ERISA-qualifying retirements plan were not property of the estate under **11 U.S.C. § 541(c)(2)** and *Patterson v. Shumate*, 504 U.S. 753 (1992), and therefore, they could not be exempted from the estate. The investment account also could not be claimed as exempt under **11 U.S.C. § 522(b)**, ERISA or Kansas law. Finally, bankruptcy court did not abuse its discretion by granting the spouse relief from the automatic stay for "cause" under **11 U.S.C. § 362(d)(1)**. A spouse's rights in an ERISA-qualifying retirement plan and "Qualified Domestic Relations Orders" are discussed.

187. ***Kittel v. First Union Nat'l Bank (In re Kittel)*, 285 B.R. 344, 2002 WL 924619, WO-01-094 & WO-01-095 (10th Cir. BAP filed May 8, 2002) (Nugent, J.) (before Pusateri, Boulden & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *appeal dismissed*, No. 02-6247 (10th Cir. filed Jan. 6, 2003)**.

Various orders of the bankruptcy court were AFFIRMED, and the Appellants' request for sanctions was DENIED. A bank's claim against the Chapter 13 debtor for prepetition **attorney's fees** incurred in foreclosing on real property was allowable under the relevant contracts and a prepetition state court foreclosure judgment. The Appellants, the debtor and her spouse, were barred under principles of **collateral estoppel** from attacking the state court judgment, and that judgment was entitled to full faith and credit under the Constitution and **28 U.S.C. § 1738**. The bank properly requested the awarded fees in its proof of claim against the debtor, under **11 U.S.C. § 502(a)** and **Fed. R. Bankr. P. 3001(f)**, its proof of claim served as prima facie evidence of the validity and amount of the claim, and the debtor failed to bring forth any evidence to attack the claim. **11 U.S.C.**

§ 1322(b)(2) prohibited the debtor from modifying the secured bank's "rights" and, therefore, the bank was entitled to assert the full amount of its claim against the debtor. The bank was not required to comply with **Fed. R. Bankr. P. 2016(a)** in making a fee request, because that Rule only applies to fees requested for services rendered to a bankruptcy estate. The debtor's spouse's attack of an order granting the bank relief from the automatic stay to confirm its foreclosure sale was an improper **collateral attack** of a final order. Finally, the bankruptcy court did not err in refusing to confirm the debtor's Chapter 13 plan which, in light of the amount of the bank's allowed claim, was not feasible. Although orders denying confirmation of a Chapter 13 plan are not typically "final" orders subject to review under **28 U.S.C. § 158(a)**, the order in this case was final because it served to terminate the debtor's Chapter 13 case.

188. ***In re Lampe*, 278 B.R. 205 (10th Cir. BAP 2002) (Cordova, J.) (before McFeeley, C.J., and Cornish & Cordova, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *aff'd*, 331 F.3d 750 (10th Cir. 2003).**

A bankruptcy court order overruling objections to the debtor-husband's claimed exemption in tools of the trade was AFFIRMED, but its order sustaining objections to the debtor-wife's same exemption was REVERSED. The debtors, who had temporarily ceased their farming operations, were entitled to claim farm equipment as tools of the trade under Kansas law. The debtor-wife had a sufficient interest in the equipment to claim an exemption therein. Burden of proof related to exemption objections under **Fed. R. Bankr. P. 4003(c)** discussed.

189. ***In re Armstrong*, UT-02-038 (10th Cir. BAP May 22, 2002) (before Pusateri, Bohanon, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *aff'd*, 101 F. App'x 766 (10th Cir. 2004).**

A notice of election to have appeal heard by the District Court, as opposed to the Bankruptcy Appellate Panel, was DENIED because it failed to comply with **Fed. R. Bankr. P. 8001(e)** and was untimely under **28 U.S.C. § 158(c)(1)**. The appeal was DISMISSED because the Appellant failed to pay filing fees.

190. ***In re Cowdin*, 292 B.R. 711, 2002 WL 1300704, WO-01-080 (10th Cir. BAP filed May 30, 2002) (per curiam) (before Clark, Cordova & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order denying a creditor's motion to extend the deadline to file a complaint against the Chapter 7 debtors pursuant to 11 U.S.C. § 523(a)(2) was AFFIRMED. The motion was untimely under **11 U.S.C. § 523(c)** and **Fed. R. Bank. P. 4007(c)** and **9006(b)(3)**. "**Excusable neglect**" under **Fed. R. Bankr. P. 9006(b)(1)** did not apply to allow a late-filed complaint, and the creditor's nondischargeability claim did not "relate back" to pleadings filed in the debtors' previous Chapter 13 case. **11 U.S.C. § 105(a)** could not be used to expand the strict time periods set forth in Rule 4007(c).

191. ***In re Armstrong*, UT-02-011 (10th Cir. BAP filed June 4, 2002) (before Pusateri, Bohanon, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *appeal dismissed,* 99 F. App'x 860 (10th Cir. 2004)**.

Appeal was DISMISSED for lack of appellate jurisdiction because the Appellant's notice of appeal was not timely filed under **Fed. R. Bankr. P. 8002(a)**.

192. ***In re Wynn*, 285 B.R. 344, 2002 WL 1270176, WO-02-010 (10th Cir. BAP filed June 7, 2002) (Boulden, J.) (before McFeeley, C.J., and Boulden & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order disallowing an unsecured claim in its entirety was AFFIRMED. **11 U.S.C. § 502(b)(9)** and **Fed. R. Bankr. P. 3002(a)** and **9006(b)(3)** mandate unsecured creditors to file proofs of claim and, therefore, the bankruptcy court did not err in disallowing the claim. Furthermore, the creditor had not filed an **informal proof of claim**.

193. ***Daniels v. Clark (In re Clark)*, 2002 WL 1821600, WO-01-026 (10th Cir. BAP filed Aug. 9, 2002) (Brown, J.) (before Clark, Cordova, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

The bankruptcy court's summary judgment in favor of the debtor, dismissing the plaintiff's claims under **11 U.S.C. § 523(a)(2)(A)** and **(a)(6)**, was AFFIRMED. A debtor's promise of future intention may be a false representation under § 523(a)(2)(A). But, the plaintiff failed to show that the debtor knew that his statement of future intention was false when made and, therefore, the bankruptcy court did not err in granting the debtor summary judgment. Summary judgment in favor of the debtor was also appropriate under § 523(a)(6) because the plaintiff failed to assert any facts supporting an intentional interference with contract action under Oklahoma law.

194. ***Dimeff v. Good (In re Good)*, 281 B.R. 689 (10th Cir. BAP 2002) (Clark, J.) (before Pusateri, Clark, & Bohanon, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A motion to dismiss the appeal was GRANTED in part, and DENIED in part. The Court lacked jurisdiction under **28 U.S.C. § 158(a)** over an appeal of orders for which no timely notice of appeal had been filed under **Fed. R. Bankr. P. 8002**. A motion for fees and costs under **11 U.S.C. § 523(d)** did not toll the time to appeal a judgment dismissing causes of action under 11 U.S.C. §§ 523(a) and 727(a). Furthermore, the appeal of the judgment allowing the § 523(d) fees was untimely because the notice of appeal was filed more than ten days after the entry of a judgment allowing the fees. **Fed. R. Bankr. P. 7054, 9001(7), 9002(5), 9021.** The entry of a later identical judgment did not commence or recommence the time to appeal under Rule 8002 because it merely copied the first order allowing § 523(d) fees. The Court AFFIRMED the only order over which it had jurisdiction–the order denying a motion for reconsideration which was brought under

Fed. R. Bankr. P. 9023 or **9024**.

195. ***In re Schott*, 282 B.R. 1 (10th Cir. BAP 2002) (McFeeley, C.J.) (before McFeeley, C.J., and Pusateri & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order denying the Chapter 7 debtors' motion seeking to hold a creditor in contempt for violating their discharge under **11 U.S.C. § 524(a)** was AFFIRMED in part where a binding reaffirmation agreement existed. The bankruptcy court did not err in upholding the reaffirmation agreement, which the debtors did not argue was improper under **11 U.S.C. § 524(c),** or in its interpretation of the agreement. The case was REMANDED in part to allow the bankruptcy court to address certain charges made under the agreement. *See In re Schott*, 302 B.R. 113, 2003 WL 729070, WY-02-073 (10th Cir. BAP Mar. 3, 2003) [211].

196. ***In re Petroleum Production Management, Inc.*, 282 B.R. 9 (10th Cir. BAP 2002) (Cordova, J.) (before Bohanon, Cornish, & Cordova, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

An appeal of an order denying a motion to reopen the debtor's Chapter 11 case was DISMISSED. Although the Appellant, a purchaser of the debtor's assets, had standing to request that the debtor's case be reopened, it lacked **standing** to appeal the order denying that request because it was not affected pecuniarily. Even if the Appellant had standing to appeal, the bankruptcy court did not abuse its discretion in refusing to reopen the debtor's case under **11 U.S.C. § 350(b)**.

197. ***In re Beach*, 281 B.R. 917 (10th Cir. BAP 2002) (Clark, J.) (before Clark, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order requiring the Chapter 7 debtors to turnover their tax returns and any portion of a tax refund attributable to the prepetition year was AFFIRMED. The trustee's turnover request was within the scope of his duties under **11 U.S.C. § 704(1)**, and the debtors had a duty to comply under **11 U.S.C. § 521(3)** and **(5)** and **Fed. R. Bankr. P. 4002(4)**. Refusal to turnover the tax returns could result in a denial of the debtors' discharge, subject them to criminal liability under **18 U.S.C. §§ 151(1)**, **151(9)** and **3284**, and to the imposition of sanctions. **26 U.S.C. § 6103** had no application to the trustee's request.

198. ***In re Michaels*, 282 B.R. 234 (10th Cir. BAP 2002) (Michael, J.) (Boulden, Michael, & Cordova, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *rev'd sub nom. In re Vigil*, 74 F. App'x 19 (10th Cir. 2003).**

Bankruptcy court orders in two cases sustaining objections to the Chapter 7 debtors' claimed exemption in the cash surrender value of life insurance polices was AFFIRMED

on the ground that the exemptions were properly disallowed under Wyoming law.

198A. ***Davis v. Chapman (In re Chapman)*, 292 B.R. 711, 2002 WL 1926137, NO-02-025 (10th Cir. BAP filed Aug. 21, 2002) (Pusateri, J.) (before McFeeley, C.J., and Pusateri & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court order excepting the debtor's former spouse's claim for attorney fees and costs from discharge under 11 U.S.C. § 523(a)(5) was AFFIRMED.

199. ***Garrett v. NEBHELP, Inc. (In re Garrett)*, 292 B.R. 711, 2002 WL 1926153, WO-02-027 (10th Cir. BAP filed Aug. 21, 2002) (Pusateri, J.) (before Pusateri, Clark, & Cordova, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *aff'd*, 64 F. App'x 739 (10th Cir. 2003).**

A bankruptcy court judgment refusing to except the Chapter 7 debtors' student loan debt from discharge under **11 U.S.C. § 523(a)(8)** was AFFIRMED. The bankruptcy court correctly held that repayment of the debt was not an "undue hardship."

200. ***In re Furr's Supermarkets, Inc.*, 283 B.R. 60 (10th Cir. BAP 2002) (Nugent, J.) (before Boulden, Cornish, & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico), *appeal dismissed*, No. 02-2282 (10th Cir. filed Oct. 29, 2002)**.

A bankruptcy court order granting a Chapter 7 trustee's motion for an extension of time to assume or reject a nonresidential real property lease was AFFIRMED. The order, which calculated payments that the trustee was required to make to the lessor under **11 U.S.C. § 365(d)(3)** for the period of time that the debtor occupied the property after its Chapter 11 case was converted to Chapter 7, correctly adopted the majority "proration" calculation method, as opposed to a "performance date" rule.

201. ***In re Bennett*, 283 B.R. 308 (10th Cir. BAP 2002) (Clark, J.) (before Clark, Bohanon, & Nugent, JJ.) (Petition for Writ of Mandamus Directed at the United States Bankruptcy Court for the District of New Mexico).**

The debtors and their attorney filed a notice of appeal from several bankruptcy court orders in which the judge refused to recuse himself from the debtors' Chapter 12 case. The notice of appeal was treated as a petition for writ of mandamus. As a court "established by an Act of Congress," jurisdiction existed under **28 U.S.C. § 1651(a)** to consider the petition, and the petition was DENIED. The bankruptcy judge's refusal to recuse himself from the case was not an abuse of discretion under **28 U.S.C. § 455(a)** and **Fed. R. Bankr. P. 5004.** Standards applicable to mandamus and recusal requests discussed.

202. ***Armstrong v. Potter (In re Potter)*, 292 B.R. 711, 2002 WL 31802978, BAP No. UT-01-**

027 (10th Cir. BAP filed Oct. 8, 2002) (Michael, J.) (Pusateri, J., dissenting) (before Pusateri, Bohanon, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *appeal dismissed*, 101 F. App'x 770 (10th Cir. 2004).

After remand, *see* *Armstrong v. Potter (In re Potter)*, 285 B.R. 344, 2002 WL 463704, BAP No. UT-01-27 (10th Cir. BAP filed Mar. 27, 2002) [181], an appeal from a bankruptcy court order dismissing the plaintiff's adversary proceeding against the debtor was DISMISSED, and a bankruptcy court order denying the plaintiff's motion to recuse was AFFIRMED. The plaintiff, also a debtor, lacked **standing** to prosecute the appeal because a Chapter 11 trustee had been appointed in his case, he had failed to show that he was a "person aggrieved," and he had not moved to intervene in the proceeding under **Fed. R. Bankr. P. 24.** The order denying the plaintiff's recusal motion was appropriate under **28 U.S.C. § 455**.

203. ***In re Myers*, 284 B.R. 478 (10th Cir. BAP 2002) (Bohanon, J.) (before Bohanon, Boulden, & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico), *aff'd*, 362 F.3d 667 (10th Cir. 2004).**

A bankruptcy court order denying a governmental agency's motion for relief from stay to affect a post-discharge setoff was AFFIRMED. The agency could not setoff its claim against the debtors' claim against it and, therefore, there was no cause to lift the automatic stay. Because the debtors had received a discharge under **11 U.S.C. § 727(b)**, the agency had no "claim" under **11 U.S.C. § 101(5)** and **(12)** against them to set off as required under **11 U.S.C. § 553(a)**.

204. ***Reeves v. Stewart (In re Stewart)*, 292 B.R. 711, 2002 WL 31422026, BAP No. WO-02-040 (10th Cir. BAP filed Oct. 29, 2002) (Pusateri, J.) (before Pusateri, Clark, & Cordova, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order granting a motion under **Fed. R. Bankr. P. 7052** in an adversary proceeding commenced under **11 U.S.C. § 523(a)(2)(A)** and granting judgment in favor of the debtor was AFFIRMED. The Appellant-creditor failed to show that any of the bankruptcy court's findings of fact in support of its order and judgment were clearly erroneous. The Appellant's argument that her claim against the debtor was nondischargeable under 11 U.S.C. § 523(a)(2)(B) was rejected because it had not been raised below and, therefore was waived on appeal.

205. ***In re Miller*, 284 B.R. 734 (10th Cir. BAP 2002) (Michael, J.) (before McFeeley, C.J., and Bohanon & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order allowing a claim of the debtor's former spouse as a unsecured priority claim under **11 U.S.C. § 507(a)(7)** was AFFIRMED. Applying the tests used under **11 U.S.C. § 523(a)(5)**, the Court held that the claim was in the nature of alimony

and support entitled to priority under § 507(a)(7).

206. ***Salazar v. Bekaert (In re Crestview Funeral Home, Inc.)*, 292 B.R. 711, 2002 WL 31794155, BAP No. NM-02-046 (10th Cir. BAP filed Dec. 13, 2002) (Pusateri, J.) (before Pusateri, Cornish, & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's directed verdict against the debtor under **Fed. R. Bankr. P. 7052** was AFFIRMED because the Appellant failed to provide an **adequate record for review**.

207. ***Salazar v. McCormick (In re Crestview Funeral Home, Inc.)*, 292 B.R. 711, 2002 WL 31793997, BAP No. NM-02-044 (10th Cir. BAP filed Dec. 13, 2002) (Pusateri, J.) (before Pusateri, Cornish, & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's order denying the debtor's emergency writ of habeas corpus was AFFIRMED. Bankruptcy courts lack jurisdiction to issue writs of **habeas corpus**, and even if jurisdiction existed, the debtor failed to prove that he was entitled to such a writ under **28 U.S.C. § 2256 (repealed)**.

208. ***In re Kleinfeldt*, 287 B.R. 291 (10th Cir. BAP 2002) (Bohanon, J.) (before Bohanon, Boulden, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order denying the Chapter 7 debtor and his nondebtor spouse's motion for turnover of a tax refund was AFFIRMED. The nondebtor spouse, a homemaker, was not entitled to any of the refund and, therefore, the entire refund was property of the debtor's estate under **11 U.S.C. § 541(a)(1)**. The phrase "**tax refund"** is defined.

209. ***In re Baker*, 302 B.R. 112, 2003 WL 90453, BAP No. NM-02-018 (10th Cir. BAP filed Jan. 10, 2003) (Nugent, J.) (before Pusateri, Cornish, & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court order confirming a Chapter 11 plan of reorganization was AFFIRMED. The bankruptcy court's findings of fact supporting its conclusion that the plan was feasible under **11 U.S.C. § 1129(a)(11)** were not clearly erroneous.

209A. ***Lea County State Bank v. Eunice Pub. Schools (In re Sims)*, 294 B.R. 198, 2003 WL 131806, BAP No. NM-02-069 (10th Cir. BAP filed Jan. 16, 2003) (Michael, J.) (before Bohanon, Michael, & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

After the dismissal of the debtors' Chapter 13 case, a creditor sought to garnish the funds

that had been paid to the trustee during the case. The debtors, however, had previously served the trustee with a notice of assignment, assigning the funds to their attorney. The bankruptcy court's order holding that the debtors' assignment was valid and, therefore, precluded the creditor from garnishing the funds was AFFIRMED.

210. ***In re Miller*, 288 B.R. 879 (10th Cir. BAP 2003) (Cornish, J.) (before Pusateri, Cornish, & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court order reducing the fees of the Chapter 12 debtors' attorney, and requiring that the fees be paid as an administrative expense through the confirmed plan was AFFIRMED. The bankruptcy court did not err in reducing the hourly rate of the debtors' attorney under **11 U.S.C. § 330.** Furthermore, the debtors' confirmed plan provided for the payment of the fees as an administrative expense, as opposed to being paid directly to the attorney.

211. ***In re Schott*, 302 B.R. 113, 2003 WL 729070, BAP No. WY-02-073 (10th Cir. BAP filed Mar. 3, 2003) (Clark, J.) (before Pusateri, Clark, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *appeal dismissed*, No. 03-8028 (10th Cir. filed Sept. 21, 2004)**

A motion to dismiss the appeal was DENIED, and the bankruptcy court's orders were AFFIRMED. The Appellants' corrected notice of appeal, filed eleven days after the entry of the order appealed and designating a second order for appeal, was a proper motion to amend the timely-filed notice of appeal. The motion to amend was granted because **Fed. R. Bankr. P. 8001(a)** does not require that orders appealed be designated, and there was no prejudice to the Appellee by the prompt correction of orders appealed. The stricter rule for designating orders for appeal set forth in **Fed. R. App. P. 3(c)(1)(B)** is liberally construed in the Tenth Circuit. The Court refused to reverse the bankruptcy court's order, entered after a remand in *In re Schott*, 282 B.R. 1 (10th Cir. BAP 2002) [195]. The appeal was an attack of the Court's earlier controlling decision. The bankruptcy court did not abuse its discretion in refusing to amend its judgment under **Fed. R. Bankr. P. 9023**.

212. ***Webster v. TEC Res., LLC (In re TEC Res., LLC)*, 302 B.R. 113, 2003 WL 938818, BAP No. NO-02-056 (10th Cir. BAP filed Mar. 10, 2003) (Clark, J.) (Cordova, J., concurring) (before McFeeley, C.J., & Clark and Cordova, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court summary judgment in favor of the reorganized Chapter 11 debtor in an adversary proceeding seeking to set aside an order approving a court-approved sale, and an order denying the plaintiff-Appellants' motion for rehearing were AFFIRMED**.** The Court lacked jurisdiction to review the order approving the sale because it was not timely appealed. But, in light of the Appellants' ***pro se*** status, the Court considered whether the sale order could be set aside as a **void judgment** pursuant to **Fed. R. Bankr.**

P. 9024 and Fed. R. Civ. P. 60(b). The sale order was not set aside because the Appellants failed to show that it was entered as a result of fraud, or that the bankruptcy court lacked jurisdiction to enter the order.

213. ***In re Schicke*, 290 B.R. 792 (10th Cir. BAP 2003) (Clark, J.) (Cordova, J., dissenting) (before Clark, Cornish, & Cordova, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *aff'd*, 97 F. App'x 249 (10th Cir. 2004).**

A bankruptcy court order denying a creditor's motion to reopen the debtor's closed Chapter 7 case pursuant to **11 U.S.C. § 350(b)** was AFFIRMED because reopening the case would afford the creditor no relief. The creditor sought to reopen the case to commence an adversary proceeding seeking to except its claim from discharge, even though the time for filing such a complaint had lapsed under **11 U.S.C. § 523(c)** and **Fed. R. Bankr. P. 4007(c)**. **11 U.S.C. § 523(a)(3)(B)** did not extend the deadline to file a dischargeability complaint because the creditor had knowledge of the debtor's case through its attorney-agent. The debtor properly scheduled the creditor in the care of its attorney under **Fed. R. Bankr. P. 1007(b)**, and the attorney's receipt of notice prior to the expiration of the deadline to file dischargeability complaints was imputed to the creditor. Given the facts of the case, such imputed notice was proper under 1**1 U.S.C. § 342** and did not offend **due process**.

214. ***In re Black*, 302 B.R. 112, 2003 WL 1191733, BAP Nos. UT-02-065 & UT-02-066 (10th Cir. BAP filed Mar. 14, 2003) (McFeeley, C.J.) (before McFeeley, C.J., and Pusateri & Cordova, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *aff'd*, 130 F. App'x 205 (10th Cir. 2005)**.

Bankruptcy court orders disallowing a portion of a proof of claim and denying a motion for reconsideration were AFFIRMED because the parties had failed to provide the Court with an **adequate record for review**.

215. ***In re Moore*, 302 B.R. 112, 2003 WL 1389066, BAP No. EO-02-078 (10th Cir. BAP filed Mar. 20, 2003) (Nugent, J.) (before Boulden, Cordova, & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

Appeal of a bankruptcy court order denying a motion for reconsideration from an earlier order holding that criminal prosecution of the debtor was excepted from the automatic stay was DISMISSED as **moot**. The Court was unable to afford the debtor-Appellant any relief on appeal because he failed to obtain a stay pending appeal and, therefore, prosecution of the case went forward and he served his sentence. Even if the Court were to reverse the order appealed, it would not be a **void judgment** that could be used to expunge the debtor's criminal record.

216. ***In re Robinson*, 294 B.R. 198, 2003 WL 1442465, BAP No. UT-02-043 (10th Cir. BAP filed Mar. 21, 2003) (Pusateri, J.) (before McFeeley, C.J., and Pusateri & Cordova,**

JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).

Appeal from a bankruptcy court order dismissing the debtor's Chapter 13 case with prejudice was DISMISSED as **moot**.

216A. ***In re Armstrong*, 292 B.R. 678 (10th Cir. BAP 2003) (McFeeley, C.J.) (before McFeeley, C.J., and Bohanon & Cordova, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order temporarily estimating and allowing a claim pursuant to **Fed. R. Bankr. P. 3018(a)** for purposes of permitting the claimant to vote on the debtor's Chapter 11 plan was AFFIRMED. The debtor's appeal was not an improper **collateral attack** of the final confirmation order because the order before the court was a separate order. The appeal **moot** because the Court could not offer relief. Assuming jurisdiction, however, the Court affirmed the bankruptcy court, discussing **contract interpretation** under Utah law, the **parole evidence** rule, **due process, 11 U.S.C. §§ 342(a), 1129(a)(10) and (b)**, and **Fed. R. Bankr. P. 3006 and 3018(a)**.

217. ***In re Black*, 292 B.R. 693 (10th Cir. BAP 2003) (Pusateri, J.) (before McFeeley, C.J., and Pusateri & Cordova, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *appeal dismissed*, No. 03-4146 (10th Cir. filed Apr. 19, 2004).**

The bankruptcy court's order confirming the debtor's Chapter 13 plan was AFFIRMED, but a later order modifying the confirmed plan was REVERSED, and the case was REMANDED. The Appellant's points of error related to the confirmation order had not been raised in the bankruptcy court and, therefore, were **waived on appeal.** The order modifying the confirmed plan was in error because it provided payments that exceeded the time limits set forth in **11 U.S.C. §§ 1322(d)** and **1329(c)**.

218. ***In re Kopexa Realty Venture Co.*, 294 B.R. 198, 2003 WL 21191108, BAP No. KS-02-042 (10th Cir. BAP filed May 21, 2003) (Boulden, J.) (before Boulden, Michael, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

Appeal was DISMISSED for lack of appellate jurisdiction because it was **moot,** the Appellant lacked **standing**, and the relief sought was not appropriate for appellate review.

219. ***Lang v. Lang (In re Lang)*, 293 B.R. 501 (10th Cir. BAP 2003) (McFeeley, C.J.) (before McFeeley, C.J., and Bohanon & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *motion for rehearing denied*, BAP No. UT-01-097 (10th Cir. BAP filed June 24, 2003), *appeal dismissed for lack of jurisdiction*, No. 03-4154 (10th Cir. filed Oct. 1, 2003), *appeal of rehearing order dismissed*, No. 03-4241 (10th Cir. filed July 8, 2004).**

A bankruptcy court judgment, excepting the debtor's former spouse's claim from discharge under **11 U.S.C. § 523(a)(2)(A)**, was AFFIRMED in part and REVERSED in part. The Appellee's objection to the Appellant's designation of record under **Fed. R. Bankr. P. 8006** was construed as a motion to strike, and was DENIED. The successor judge who was assigned to the adversary proceeding after trial had commenced did not err under Fed. R. Civ. P. 63, made applicable under **Fed. R. Bankr. P. 9028**. There was no error in holding the spouse's claim to be nondischargeable under § 523(a)(2)(A). Although bankruptcy courts have jurisdiction pursuant to **28 U.S.C. § 157** to award monetary damages under § 523(a), the matter was remanded for a determination of the amount of compensatory damages. The bankruptcy court's award of punitive damages was reversed because applicable law did not support such an award and, in making the award, the bankruptcy court acted beyond the scope of a remand order from the Court of Appeals for the Tenth Circuit.

220. ***Rural Enterprises of Okla., Inc. v. Watson (In re Watson)*, 294 B.R. 198, 2003 WL 21241702, BAP No. WO-02-090 (10th Cir. BAP filed May 29, 2003) (Thurman, J.) (before Boulden, Nugent, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court judgment excepting a debt from discharge under **11 U.S.C. § 523(a)(2)(B)** was AFFIRMED.

221. ***In re Busch*, 294 B.R. 137 (10th Cir. BAP 2003) (Cornish, J.) (before Pusateri, Cornish, & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order granting a motion for relief from the automatic stay under **11 U.S.C. § 362(d)(1)** was AFFIRMED. The creditor's judicial lien against the property in question was not avoidable pursuant to **11 U.S.C. § 522(f)**.

222. ***In re Farwell*, 294 B.R. 198, 2003 WL 21339356, BAP No. KS-02-086 (10th Cir. BAP filed June 10, 2003) (Cornish, J.) (before Clark, Bohanon, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

Two orders of the bankruptcy court were summarily AFFIRMED because the Appellants failed to provide an **adequate record for review**.

223. ***In re Mayes*, 294 B.R. 145 (10th Cir. BAP 2003) (Nugent, J.) (McFeeley, C.J., dissenting) (before McFeeley, C.J., and Boulden & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A bankruptcy court order dismissing the debtor's motion to avoid the Cherokee Nation's judicial lien under **11 U.S.C. § 522(f)** under the common law doctrine of tribal **sovereign immunity** was AFFIRMED. The avoidance motion, brought as a contested matter under **Fed. R. Bankr. P. 4003(d)** and **9014**, was a "suit" against the Nation from which the

Nation was immune, and the Nation had not waived its immunity from suit.

224. ***Salazar v. McCormick (In re Crestview Funeral Home, Inc.)*, 294 B.R. 198, 2003 WL 21383005, BAP No. NM-02-070 (10th Cir. BAP filed June 16, 2003) (Boulden, J.) (before Boulden, Michael, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court judgment concluding that the Chapter 7 trustee was not personally liable for his acts in the debtor's case was AFFIRMED. The bankruptcy court did not abuse its discretion in making certain procedural rulings, and its findings of fact in support of its judgment were not clearly erroneous.

225. ***In re Duncan*, 294 B.R. 339 (10th Cir. BAP 2003) (Michael, J.) (before Boulden, Michael, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order disallowing a nondebtor spouse's claimed homestead exemption in property that she did not own was AFFIRMED. Under Wyoming law, a person must have an ownership interest in the property claimed as exempt. Furthermore, there is no provision in the Bankruptcy Code allowing a nondebtor to claim an exemption in a bankruptcy case. **11 U.S.C. § 522(l)** only allows a nondebtor to claim an exemption on behalf of the debtor.

226. ***In re Armstrong*, BAP No. UT-03-17 (10th Cir. BAP filed June 18, 2003) (before McFeeley, C.J. & Nugent, J.) (Appeal from the United States Bankruptcy Court for the District of Utah), *aff'd*, 99 F. App'x 866 (10th Cir. 2004).**

Appeal DISMISSED because the Appellant failed to file his appellate brief after two motions seeking an extension of time to do so were denied.

227. ***In re Armstrong*, 294 B.R. 344 (10th Cir. BAP 2003) (McFeeley, C.J.) (before McFeeley, C.J., and Bohanon & Cordova, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *aff'd*, 97 F. App'x 285 (10th Cir. 2004).**

A bankruptcy court order under **Fed. R. Bankr. P. 3018(a)** temporarily allowing a creditor's claim was AFFIRMED. The appeal was not an improper **collateral attack** of a final order confirming a Chapter 11 plan. The appeal was **moot**. The ***Rooker-Feldman* doctrine**, **collateral estoppel**, and **11 U.S.C. § 1129(b)** are discussed. The order temporarily allowing the claim was not a **void judgment** because notice was proper under **11 U.S.C. § 342**. Also, the order, entered by a bankruptcy judge who later recused herself from the debtor's case pursuant to **28 U.S.C. § 455**, was not void because the Appellant-debtor failed to show bias prior to recusal. **Adequate record for review**, **28 U.S.C. § 753(f)**, **Fed. R. App. P. 10(b)(2)** and **10th Cir. BAP L.R. 8009-1(b)** are discussed.

228. ***In re Broadband Wireless Int'l Corp.*, 295 B.R. 140 (10th Cir. BAP 2003) (Clark, J.) (before Clark, Nugent, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order partially disallowing a proof of claim against the Chapter 11 debtor was AFFIRMED. The proof of claim was not prima facie evidence of the validity of the creditor's claim under **Fed. R. Bankr. P. 3001(f)** because it did not assert a claim against the debtor, and the creditor failed to meet its burden of showing that he had a claim against the debtor. The content of proofs of claim under **11 U.S.C. § 501**, the affect of the debtor's scheduling of a claim under **11 U.S.C. § 1111** and **Fed. R. Bankr. P. 3003**, and the burden of proof related to claim objections under **11 U.S.C. § 502** discussed.

229. ***In re Medical Management Group, Inc.*, 302 B.R. 112, 2003 WL 21487310, BAP No. WO-03-004 (10th Cir. BAP filed June 27, 2003) (Starzynski, J.) (before Clark, Nugent, & Starzynski, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order denying relief from the automatic stay to continue an administrative action against the debtor's former officer in state court was REVERSED. The order denying stay relief was a "final order" under **28 U.S.C. § 158(a)(1)**. **11 U.S.C. § 362(a)** did not apply to the nondebtor officer, and the officer had not met his burden of proving that he was entitled to an injunction under **11 U.S.C. § 105(a)**.

230. ***Rushton v. Star Diamonds, Inc. (In re Eleva, Inc.)*, 302 B.R. 112, 2003 WL 21516983, BAP No. UT-02-051 (10th Cir. BAP filed June 30, 2003) (Bohanon, J.) (before McFeeley, C.J., and Bohanon & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

After the trustee-plaintiff obtained a preference judgment against a creditor, he recovered the transferred property and sold it for less than the amount of the judgment. The trustee then commenced an adversary proceeding against the creditor-transferee's alleged principal, seeking payment of the deficiency. A bankruptcy court order granting the principal summary judgment was AFFIRMED because the principal was not liable to the estate under **11 U.S.C. § 550(a)** for the deficiency. Pursuant to **§ 550(d)**, the trustee was only entitled to a single satisfaction of the avoided transfer.

231. ***In re Robinson*, 295 B.R. 147 (10th Cir. BAP) (Nugent, J.) (before McFeeley, C.J., and Boulden & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma), *appeal voluntarily dismissed*, No. 03-5130 (10th Cir. filed Oct. 10, 2003)**

A bankruptcy court order sustaining an objection to the debtor's claimed homestead exemption and denying the debtor's motion to avoid a judgment lien against the homestead was AFFIRMED. The debtor failed to meet her ultimate burden of proof to

show that she was entitled to an exemption under Oklahoma law. **Fed. R. Bankr. P. 4003(c)** and burdens of proof for exemptions discussed.

232. ***In re Picard*, 302 B.R. 112, 2003 WL 21643436, BAP No. WY-03-016 (10th Cir. BAP filed July 14, 2003) (Michael, J.) (before Bohanon, Michael, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order authorizing the Chapter 7 trustee's sale of a truck was AFFIRMED. The truck was property of the estate under **11 U.S.C. § 541** as a result of the debtor's right to redeem it under Wyoming law. The bankruptcy court lacked jurisdiction under **28 U.S.C. § 157** to resolve a dispute between the objector-Appellant and the holder of a lien against the truck.

233. ***In re Sandoval*, BAP No. UT-03-054 (10th Cir. BAP filed July 31, 2003) (before Michael, Brown, & McNiff, JJ.) (Petition for Writ of Mandamus Directed at the United States Bankruptcy Court for the District of Utah), *appeal dismissed*, No. 03-4204 (10th Cir. filed Jan. 8, 2004).**

A petition for writ of mandamus was DENIED.

233A. ***In re Wedel*, BAP No. KS-03-049 (10th Cir. BAP filed July 21, 2003) (before Cornish, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *appeal dismissed*, 107 F. App'x 824 (10th Cir. 2004).**

Appellants' appeal was DISMISSED because it was not timely filed under **Fed. R. Bankr. P. 8002(a).**

233B. ***In re Wedel*, BAP No. KS-03-050 (10th Cir. BAP filed July 21, 2003) (before Cornish, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *appeal dismissed*, 102 F. App'x 639 (10th Cir. 2004).**

Appellants' appeal was DISMISSED because it was not timely filed under **Fed. R. Bankr. P. 8002(a).**

234. ***Morris v. Beach (In re Beach)*, 302 B.R. 112, 2003 WL 21827770, BAP No. KS-03-021 (10th Cir. BAP filed Aug. 7, 2003) (Bohanon, J.) (before Bohanon, Cornish, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order granting the Chapter 7 trustee's motion for default judgment in an adversary proceeding to revoke the debtors' discharge under 11 U.S.C. § 727(d) and a motion for sanctions was REVERSED and the matter was REMANDED. The motions were not supported by any evidence and, therefore, the bankruptcy court's order was in error.

235. ***In re Abbott*, 302 B.R. 112, 2003 WL 22003359, BAP No. WY-02-058 (10th Cir. BAP filed Aug. 25, 2003) (Michael, J.) (Brown, J., dissenting) (before Boulden, Michael, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *rev'd and remanded*, 96 F. App'x 654 (10th Cir. 2004).**

A bankruptcy court order denying the Chapter 13 debtor's motion to reclaim a **tax refund** from the trustee was AFFIRMED. The tax refund could not be used to reduce the total number of payments the debtor was required to make under his confirmed plan because the express terms of the plan required the debtor to make 36 payments, and these terms were binding pursuant to **11 U.S.C. § 1327(a)**. The bankruptcy court did not err in interpreting the plan, and its interpretation was consistent with **11 U.S.C. § 1325(b)(1)**.

236. ***In re Commercial Fin. Servs., Inc.*, 298 B.R. 733 (10th Cir. BAP 2003) (Thurman, J.) (before Clark, Nugent, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma), *aff'd*, 427 F.3d 804 (10th Cir. 2005).**

A bankruptcy court order partially denying a final request for compensation made by an official committee's financial advisor pursuant to **11 U.S.C. § 330(a)** was AFFIRMED.

237. ***Malloy v. Wallace (In re Wallace)*, 298 B.R. 435 (10th Cir. BAP 2003) (McFeeley, C.J.) (before McFeeley, C.J., and McNiff & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma), *aff'd*, 99 F. App'x 870 (10th Cir. 2004).**

Orders of the bankruptcy court granting a motion for entry of a default judgment ***nunc pro tunc*** against the Chapter 7 debtor were AFFIRMED. The debtor-Appellant had not shown that the default judgment should be set aside under **Fed. R. Bankr. P. 7055**, which makes Fed. R. Civ. P. 60(b) applicable. **Fed. R. Bankr. P. 9024**. The *nunc pro tunc* order also did not violate the debtor-Appellant's **due process** rights.

238. ***Bank One v. Kallstrom (In re Kallstrom)*, 298 B.R. 753 (10th Cir. BAP 2003) (Clark, J.) (Clark, Nugent, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court order refusing to approve a settlement agreement between a creditor and the Chapter 7 debtors in a proceeding against the debtors pursuant to **11 U.S.C. § 727(a)** was AFFIRMED. The bankruptcy court did not abuse its discretion under **Fed. R. Bankr. P. 7041** or **9019** in refusing to approve the settlement agreement. Proceedings under **11 U.S.C. § 523(a)** are distinguished from § 727(a) proceedings.

239. ***Stillwater Nat'l Bank & Trust Co. v. Kirtley (In re Solomon)*, 299 B.R. 626 (10th Cir. BAP 2003) (Nugent, J.) (before Clark, Nugent, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma, *reported at* 300 B.R. 57).**

A bankruptcy court judgment avoiding the creditor's liens against the debtor's property pursuant to **11 U.S.C. §§ 544(b)** and **548(a)(1)(B)** and Oklahoma law was AFFIRMED. The creditor failed to give the debtor reasonably equivalent value in exchange for the transfers, and the bankruptcy court did not err in concluding that the debtor was insolent at the time of the transfers.

240. ***Fry v. Simmons (In re Fry)*, 302 B.R. 112, 2003 WL 22439886, BAP No. NM-03-028 (10th Cir. BAP filed Oct. 15, 2003) (Michael, J.) (before Clark, Michael, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court judgment concluding that the debtor had no interest in the proceeds of a life insurance policy owned by his deceased former spouse was AFFIRMED. Oklahoma trust and **contract** law, and the **parol evidence** rule are discussed.

241. ***Cousatte v. Lucas (In re Lucas)*, 300 B.R. 526 (10th Cir. BAP 2003) (McFeeley, C.J.) (before McFeeley, C.J. and Bohanon & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

An order dismissing a **11 U.S.C. § 523(a)(4)** cause of action was AFFIRMED because the bankruptcy court did not err in concluding that the creditor-plaintiff had failed to prove that the debtor had embezzled funds. But, the matter was REMANDED to the bankruptcy court to determine whether some of the debtor's property was held in a **constructive trust** for the creditor-plaintiff and, therefore, was excluded from property of the estate under **11 U.S.C. § 541(a) and (d)**.

242. ***In re Snyder*, 302 B.R. 113, 2003 WL 22535245, BAP No. UT-03-055 (10th Cir. BAP filed Nov. 4, 2003) (Cornish, J.) (before Bohanon, Cornish, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *vacated and appeal voluntarily dismissed*, 303 B.R. 212 (10th Cir. BAP 2003).**

A bankruptcy court order denying the debtors' motion to reopen their Chapter 7 case was AFFIRMED because the debtors failed to provide the Court with an **adequate record for review. Fed. R. Bankr. P. 7052** and **Fed. R. Bankr. P. 8009** are discussed.

243. ***In re Wyo. Alaska Co.*, 302 B.R. 113, 2003 WL 22535223, BAP No. UT-03-022 (10th Cir. BAP filed Nov. 6, 2003) (McNiff, J.) (before Cornish, Michael, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order approving a settlement between certain nondebtor parties was REVERSED and REMANDED because the order was not accompanied by findings of fact and conclusions of law as required pursuant to **Fed. R. Bankr. P. 7052**. The debtor's law firm had **standing** to appeal the bankruptcy court's order on its own behalf because it was a "person aggrieved" by the settlement. Also, the bankruptcy court had

subject matter jurisdiction to enter the order under **28 U.S.C. § 1334(b)** because the settlement, although between nondebtors, involved property of the debtor's estate under **11 U.S.C. § 541(a)(1)**, affected the distribution of the debtor's assets, or affected the administration of the debtor's estate.

244. ***Garrett v. TEC Res., LLC (In re TEC Res., LLC)*, 302 B.R. 113, 2003 WL 22681382, BAP No. NO-03-033 (10th Cir. BAP filed Nov. 12, 2003) (McFeeley, C.J.) (before McFeeley, C.J. and Nugent & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court's order granting the defendant-debtors' motion for summary judgment and dismissing the plaintiff-claimant's complaint was AFFIRMED. The plaintiff's proof of claim against the debtors had been disallowed by a prior final order, and ***res judicata*** barred his attempt to reestablish the claim by way of an adversary proceeding. The bankruptcy court also did not err in denying the plaintiff's motion for rehearing under Fed. R. Civ. P. 59(e), made applicable in bankruptcy under **Fed. R. Bankr. P. 9023**.

245. ***In re Haddox*, 302 B.R. 112, 2003 WL 22681412, BAP No. WO-03-048 (10th Cir. BAP filed Nov. 12, 2003) (Nugent, J.) (before McFeeley, C.J., and Nugent & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order requiring the debtor's attorney to modify the debtor's confirmed Chapter 13 plan to purge language related to her student loan debt was REVERSED and the matter was REMANDED. Although the plan provision in question may have violated **11 U.S.C. § 523(a)(8)**, made applicable in Chapter 13 pursuant to **11 U.S.C. § 1328(a)(2)**, the bankruptcy court could not *sua sponte* order the modification of the debtor's confirmed plan under **11 U.S.C. § 1329(a)**. Furthermore, under *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999) [*see* 39], the final order confirming the debtor's plan was binding under **11 U.S.C. § 1327(a)** and ***res judicata*** as to all issues that could have or should have been raised prior to confirmation, even if it authorized plan provisions contrary to the Bankruptcy Code. The bankruptcy court could not invoke its equitable powers under **11 U.S.C. § 105(a)** to require post-confirmation plan modification, because those powers may only be exercised within the confines of the Bankruptcy Code.

246. ***Fanning v. Russell (In re Russell)*, 302 B.R. 112, 2003 WL 22849435, BAP No. WO-03-063 (10th Cir. BAP filed Dec. 1, 2003) (per curiam) (before Clark, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order denying the plaintiff-creditors' application for post-judgment relief was REVERSED and the matter was REMANDED. In *Lang v. Lang (In re Lang)*, 293 B.R. 501 (10th Cir. BAP), *appeal dismissed for lack of jurisdiction*, No. 03-4154

(10th Cir. filed Oct. 1, 2003) [219], this Court held that under **28 U.S.C. § 157** bankruptcy courts have subject matter jurisdiction to award monetary judgments in proceedings brought pursuant to **11 U.S.C. § 523(a)**. The bankruptcy court erred, therefore, in concluding that it lacked jurisdiction in the plaintiffs' § 523(a) action against one of the debtors to enter a monetary judgment and an order awarding the plaintiffs' attorney's fees. It also erred in concluding that it did not have jurisdiction to enter an order enforcing the judgment and fee order.

247. ***In re Inv. Co. of the Sw., Inc.*, 302 B.R. 112, 2003 WL 22900480, BAP No. NM-03-051 (10th Cir. BAP filed Dec. 8, 2003) (per curiam) (before Clark, Bohanon, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's order compelling a secured creditor to release its liens against the Chapter 11 debtor in possession's real property was VACATED. The bankruptcy court's order was a final order pursuant to **28 U.S.C. § 158(a)(1)**. Even if the order was not final, the creditor's appeal would be considered a petition for writ of **mandamus** pursuant to **28 U.S.C. § 1651(a)**, and the petition would be granted because the bankruptcy court was without authority to enter its order. The order, which approved the debtor's sale of property free and clear of the creditor's liens thereon, was inappropriate because it did not comply with **11 U.S.C. § 363(f)**. Furthermore, the order was in error because it established the debtor's treatment of the creditor's claim without affording the creditor the protections of the Chapter 11 plan confirmation process and, in particular, the cram down provisions set forth in **11 U.S.C. § 1129(b)**.

248. ***Chavez v. Skehen (In re Chavez)*, 305 B.R. 381, 2003 WL 23120081, BAP No. NM-02-081 (10th Cir. BAP filed Dec. 18, 2003) (Michael, J.) (before Clark, Michael, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico), *appeal dismissed*, No. 04-2026 (10th Cir. filed May 26, 2004).**

A bankruptcy court judgment declaring certain tax entities' liens against the exempt proceeds from the sale of the Chapter 13 debtor's residence to be valid and refusing to avoid the liens was AFFIRMED. Certain issues raised by the debtor but not briefed were not addressed by the Court because they were deemed **waived on appeal**. The tax debt, allegedly incurred solely by the debtor's former spouse during their marriage, was a community debt of the couple under New Mexico law. Although the debtor could claim a homestead exemption in the sale proceeds, New Mexico law expressly states that the exemption is not effective against tax debts, such as the debtor's community tax debt. The debtor was not denied **due process** as a result of the imposition of the liens without separate notice to her. The bankruptcy court did not err in refusing to consider the debtor's arguments pursuant to 11 U.S.C. § 505 inasmuch as the debtor failed to present evidence contesting the validity of the tax debt.

249. ***In re Miller*, 303 B.R. 471 (10th Cir. BAP 2003) (McFeeley, C.J.) (before McFeeley, C.J., and Nugent & Rasure, JJ.) (Appeal from the United States Bankruptcy Court**

for the District of Utah).

A bankruptcy court's order denying the debtor's motion pursuant to **11 U.S.C. § 706(a)** to convert his Chapter 7 case to a case under Chapter 13 was REVERSED and the matter was REMANDED. Bankruptcy courts do not have the discretion, even when there is evidence of abuse of process, to deny a debtor's § 706(a) motion if the elements of that section are met. Section 706(a) gives debtors a one time right to convert from Chapter 7 to Chapter 13, provided that the debtor is eligible for relief under Chapter 13 pursuant to 11 U.S.C. § 109(e). Bankruptcy courts cannot use their equitable powers under **11 U.S.C. § 105(a)** to circumvent the express language of § 706(a). **28 U.S.C. § 2075**, **Fed. R. Bankr. P. 1017** and **9013** cannot be used to invoke the bankruptcy court's discretion because to do so would impermissibly modify the debtor's rights under § 706(a).

249A. ***In re Miller*, 302 B.R. 705 (10th Cir. BAP 2003) (Cornish, J.) (before Bohanon, Cornish, & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order denying debtor's motion, pursuant to **11 U.S.C. § 324**, to remove trustee for alleged misconduct was **AFFIRMED** because the bankruptcy court's refusal to remove the trustee was not an abuse of discretion. Debtor's appeal of the bankruptcy court's order denying his motion to compel the trustee to turn over property that debtor claimed belonged to third parties was **DISMISSED**, since such a claim required an adversary proceeding, and debtor lacked **standing** to assert claims on behalf of others.

250. ***In re Carlson*, 303 B.R. 478 (10th Cir. BAP 2004) (Rasure, J.) (before McFeeley, C.J., and Nugent & Rasure, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order sustaining an objection to the debtor's claimed homestead exemption under **11 U.S.C. § 522(b)** was REVERSED and the matter was REMANDED. The owner of a **mobile home** may claim it as exempt under Utah Code Ann. § 78-23-3 even if he or she does not own the real property on which the home is situated.

251. ***In re Armstrong*, 303 B.R. 213 (10th Cir. BAP 2004) (Nugent, J.) (before McFeeley, C.J., and Nugent & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order dismissing the debtor's Chapter 13 case pursuant to **11 U.S.C. § 1307(c)** was AFFIRMED. The trustee in the debtor's earlier Chapter 11 case and a party who had filed a dischargeability action against the debtor in the Chapter 11 case were "parties in interest" who had **standing** under § 1307(c) to seek dismissal of the debtor's later Chapter 13 case. In defining "party in interest" in § 1307(c), the court used **11 U.S.C. § 1109(b)**. The bankruptcy court did not err in determining that the debtor's claim that he had an interest in certain trust assets was an improper **collateral attack** of

the confirmation order in his Chapter 11 case. Finally, given the totality of the circumstances, the bankruptcy court's finding that the debtor's Chapter 13 case was filed in bad faith was not clearly erroneous. The factors used for determining a lack of good faith under **11 U.S.C. § 1325(a)(3)** may be used in determining whether a case should be dismissed for cause under § 1307(c).

252. ***Hardeman v. Sadeghy (In re Sadeghy)*, 305 B.R. 381, 2004 WL 67226, BAP No. WO-03-045 (10th Cir. BAP filed Jan. 14, 2004) (per curiam) (before Clark, Brown, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court's judgment avoiding the Chapter 13 debtor's prepetition transfer of real property to his son pursuant to **11 U.S.C. § 544(b)** and Oklahoma fraudulent transfer law was AFFIRMED. The bankruptcy court correctly applied Oklahoma law, and its findings of fact, determining that the debtor transferred the property with an actual intent to hinder, delay or defraud his creditors, was not clearly erroneous. The appellant-son's points of error were either **waived on appeal** because they were not raised below, without merit because they gave rise to **harmless error**, or were without merit based on the record.

253. ***Gonzales v. United States (In re Silver)*, 303 B.R. 849 (10th Cir. BAP 2004) (Clark, J.) (before Clark, Michael, & Brown JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's amended judgment voiding tax liens against certain of the Chapter 7 debtors' personal property and postpetition tax liens against property held by nondebtor- transferees was AFFIRMED in part and REVERSED in part, and the Court RETAINED JURISDICTION in part pending receipt of a supplemental appendix. The Court retained jurisdiction over the portion of the amended judgment related to the validity of the tax liens against the debtors' art because there was not an **adequate record for review**. *See Gonzales v. United States (In re Silver)*, 305 B.R. 381, 2004 B.R. 286742, BAP No. NM-03-042 (10th Cir. BAP filed Feb. 12, 2004) [260]. The portion of the amended judgment invalidating the tax liens against the debtors' stock pursuant to **26 U.S.C. § 6323(b)(1)** was in error and, therefore, was reversed. The liens were valid, perfected liens that had not been avoided. Furthermore, the liens could not be invalidated under § 6323(b)(1) because the trustee was not a "purchaser" or the holder of a security interest in the stock under § 6323(h). The trustee's status as a hypothetical judicial lien creditor under **11 U.S.C. § 544(a)(1)**, who holds a "judicial lien" within the meaning of **11 U.S.C. § 101(36)**, does not make her a purchaser or the holder of a security interest for purposes of § 6323. The trustee could not claim to be a hypothetical bona fide purchaser under **11 U.S.C. § 545(2)** because she did not bring a cause of action under that section. As the tax liens against the stock were valid and could not be avoided or invalidated, the secured claim based on those liens should not have been disallowed under **11 U.S.C. § 502(b)(2)**. The bankruptcy court did not err, however, in voiding the postpetition tax liens made pursuant to **26 U.S.C. § 6901** because they were filed in

violation of **11 U.S.C. § 362(a)(6)**. Although the tax liens were filed against property held by nondebtor-transferees, it was undisputed that the liens served to collect the debtors' prepetition debts.

254. ***In re Armstrong*, 305 B.R. 381, 2004 WL 73364, BAP No. UT-03-002 (10th Cir. BAP filed Jan. 16, 2004) (McNiff, J.) (before McFeeley, C.J., and Nugent & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order denying the Chapter 11 debtor's emergency *ex parte* motion seeking damages against certain individuals for their alleged violations of the automatic stay and the discharge injunction was AFFIRMED. The bankruptcy court effectively abstained from considering the merits of the debtor's motion pursuant to **28 U.S.C. § 1334(c)(1)** because the debtor was attempting to circumvent a stay of litigation that had been imposed by the district court in a related adversary proceeding. The bankruptcy court had jurisdiction pursuant to **28 U.S.C. § 157** to consider the debtor's motion. Its decision to abstain from consideration of the merits was not an abuse of discretion because the motion was a clear indication of forum shopping.

255. ***In re Barnes*, 307 B.R. 731, 2004 WL 102355, BAP No. NO-03-067 (10th Cir. BAP filed Jan. 21, 2004) (per curiam) (before Clark, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court order denying the Chapter 7 debtor's claim of exemption in proceeds from the prepetition sale of her home was AFFIRMED. Arguments related to the bankruptcy court's decision to limit debtor's argument were **waived on appeal** because she failed to explain the arguments or support them in her brief. Even upon consideration, the record showed that the bankruptcy court did not abuse its discretion in refusing post-trial briefs. The bankruptcy court also did not err in denying the debtor's claimed homestead exemption in the proceeds under Oklahoma law. Finally, the bankruptcy court did not err in failing to consider **11 U.S.C. § 522(f)** where the debtor had not served notice of such a request for relief on the holder of the lien sought to be avoided. Section 522(f) also did not apply because the debtor did not hold a valid exemption under **11 U.S.C. § 522(b)** and Oklahoma law.

256. ***In re Armstrong*, 304 B.R. 432 (10th Cir. BAP 2004) (McFeeley, C.J.) (before McFeeley, C.J., and Nugent & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order assessing sanctions against the Chapter 11 debtor for **contempt** was REVERSED and the matter was REMANDED. The sanctions imposed against the debtor were punitive and, therefore, were meant to punish the debtor for criminal, not civil, contempt. The bankruptcy court lacked jurisdiction to assess sanctions for criminal contempt because the Utah district court's local rules required that such matters be referred to it.

257. ***In re Armstrong*, 305 B.R. 381, 2004 WL 166158, BAP No. UT-03-026 (10th Cir. BAP filed Jan. 27, 2004) (McFeeley, C.J.) (before McFeeley, C.J., and Nugent & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order assessing attorney's fees and costs against the Chapter 11 debtor as a result of his **contempt** was REVERSED and the matter was REMANDED. In a related appeal, *In re Armstrong*, 304 B.R. 432 (10th Cir. BAP 2004) [256], the Court determined that the bankruptcy court lacked jurisdiction to impose sanctions against the debtor for criminal contempt. For the same reasons, it lacked jurisdiction to assess fees and costs resulting from proceedings related to the debtor's contempt.

258. ***Ingram v. Womack (In re Womack)*, 305 B.R. 381, 2004 WL 221759, BAP No. KS-03-041 (10th Cir. BAP filed Feb. 4, 2004) (Cornish, J.) (before Bohanon, Cornish, & Starzynski, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *aff'd*, 122 F. App'x 400 (10th Cir. 2005).**

A bankruptcy court judgment excepting a debt from discharge pursuant to **11 U.S.C. § 523(a)(4)** was AFFIRMED. The debtor, an attorney, was ordered by a state court to hold certain funds. This order created a fiduciary duty, and the debtor's failure to abide by that order was a "defalcation."

259. ***In re Armstrong*, 305 B.R. 381, 2004 WL 224055, BAP No. UT-03-001 (10th Cir. BAP filed Feb. 4, 2004) (McFeeley, C.J.) (before McFeeley, C.J., and Nugent & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order denying the Chapter 11 debtor's *ex parte* motion to give effect to a Texas judgment was AFFIRMED. The bankruptcy court did not err in concluding that it lacked jurisdiction to consider the debtor's motion where the relief sought attacked a final order, an appeal of which was pending. Furthermore, the debtor failed to provide an **adequate record for review**.

260. ***Gonzales v. United States (In re Silver)*, 305 B.R. 381, 2004 WL 286742, BAP No. NM-03-042 (10th Cir. BAP filed Feb. 12, 2004) (Clark, J.) (before Clark, Michael, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court judgment invalidating the United States' lien against certain personal property of the debtor was REVERSED. The record, supplemented pursuant to the Court's order in *Gonzales v. United States (In re Silver)*, 303 B.R. 849 (10th Cir. BAP 2004) [253], showed that the bankruptcy court's judgment was clearly erroneous.

261. ***Lundahl v. Lewis et al. (In re Lundahl)*, BAP Nos. UT-04-003, UT-04-004, UT-04-005 (10th Cir. BAP filed Mar. 11, 2004) (before McFeeley, C.J., and Michael & Nugent, JJ.) (Appeals from the United States Bankruptcy Court for the District of Utah), *appeals dismissed*, Nos. 04-4038 & 4039, 129 F. App'x 476 (10th Cir. 2005); and**

***aff'd*, No. 04-4040 (10th Cir. filed Sept. 23, 2004)**.

Three appeals of bankruptcy court orders filed by the appellant were DISMISSED by the Court for failure to prosecute. The appellant's subsequent motions to reconsider the dismissal orders and recall the mandate were DENIED.

262. ***United Phosphorus, Ltd. v. Fox (In re Fox)*, 305 B.R. 912 (10th Cir. BAP 2004) (Bohanon, J.) (before Bohanon, Cornish, & Starzynski, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order dismissing a creditor's complaint against the Chapter 11 debtor's spouse pursuant to **11 U.S.C. § 548(a)** was AFFIRMED because the creditor lacked **standing** to bring the action. The plain language of § 548(a) states that only trustees and thus, pursuant to 11 U.S.C. § 1107(a), debtors in possession, may bring fraudulent transfer actions. Creditors may not bring suits on behalf of the estate. The **law of the case doctrine** did not bar the bankruptcy court's decision, even though another bankruptcy judge of the same court had earlier entered an order authorizing the creditor's § 548(a) proceeding. After that order was issued, *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000) was decided which, although decided under 11 U.S.C. § 506(c), effectively rejected the position taken by the first judge.

263. ***Lang v. Lang (In re Lang)*, 305 B.R. 905 (10th Cir. BAP 2004) (Michael, J.) (before Cornish, Michael, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *aff'd*, 414 F.3d 1191 (10th Cir. 2005).**

A bankruptcy court order denying the debtor's motion to extend the time to file a notice of appeal pursuant to **Fed. R. Bankr. P. 8002(c)(2)** and her motion for a stay pending appeal pursuant to **Fed. R. Bankr. P. 8005** was AFFIRMED. Failure to comply with the deadline to file a notice of appeal due to the press of other business is not **excusable neglect**. Assuming that the order denying the debtor's request for a stay pending appeal was reviewable, the debtor failed to show that she was entitled to a stay. Furthermore, because the debtor was not allowed an extension of time to file a notice of appeal, the request for stay pending appeal was moot.

264. ***Zubrod v. Keffer (In re Keffer)*, 307 B.R. 731, 2004 WL 632875, BAP No. WY-03-071 (10th Cir. BAP filed Mar. 26, 2004) (Weaver, J.) (before Michael, Thurman, & Weaver, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *appeal dismissed*, No. 04-8049 (10th Cir. filed Aug. 3, 2004).**

A bankruptcy court judgment avoiding certain transfers pursuant to **11 U.S.C. § 548(a)(1)(B)** was AFFIRMED. A prior bankruptcy court order denying the appellant's motion for summary judgment under **Fed. R. Bankr. P. 7056** was not a "judgment" that was appealable pursuant to **28 U.S.C. § 158**. The bankruptcy court's final judgment, avoiding the debtor's prepetition transfers of property to himself and his spouse as

tenants by the entireties pursuant to § 548(a)(1)(B), was summarily affirmed because the appellants failed to provide an **adequate record for review**. Furthermore, arguments related to the propriety of the § 548(a)(1)(B) judgment were **waived on appeal** because the appellants failed to make any arguments relevant to § 548(a)(1)(B). Rather, the appellants' sole contention, that the transfers were appropriate prepetition exemption planning, was only relevant under **11 U.S.C. § 548(a)(1)(A)**.

265. ***Cadwell v. Joelson (In re Joelson)*, 307 B.R. 689 (10th Cir. BAP 2004) (Brown, J.) (Michael, J., concurring) (before Clark, Michael, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *aff'd*, 427 F.3d 700 (10th Cir. 2005), *cert. den.* 547 U.S. 1163 (2006)**

A bankruptcy court judgment excepting a debt from discharge pursuant to **11 U.S.C. § 523(a)(2)(A)** was AFFIRMED because the debt resulted from the debtor's false oral statements that did not pertain to her financial condition. The phrase "statement respecting the debtor's . . . financial condition" in § 523(a)(2)(A) is narrowly interpreted to be a statement of a debtor's net worth, overall financial health, or ability to generate income. **11 U.S.C. § 523(a)(2)(B)** is discussed as it relates to § 523(a)(2)(A).

266. ***In re Lundahl*, BAP No. UT-04-021 (10th Cir BAP filed Apr. 7, 2004) (before McFeeley, C.J., and Michael & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *appeal dismissed*, No. 04-4093 (10th Cir. filed Sept. 16, 2004**).

The Court DISMISSED an appeal for failure to prosecute.

267. ***Lang v. Lang (In re Lang)*, BAP No. UT-03-070 (10th Cir. BAP filed Apr. 12, 2004) (before McFeeley, C.J., and Michael & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *appeal dismissed*, Nos. 04-4131 (10th Cir. filed Aug. 5, 2004**).

The Court DISMISSED an appeal as untimely-filed under **Fed. R. Bankr. P. 8002(a)**.

268. ***In re Hodes*, 308 B.R. 61 (10th Cir. BAP 2004) (Starzynski, J.) (before Bohanon, Cornish, & Starzynski, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order denying the debtor's claim of exemption in the cash surrender value of a life insurance policy pursuant to **11 U.S.C. § 522(b)** and Kansas law was AFFIRMED in part and REVERSED in part. The bankruptcy court correctly held that the Kansas exemption law did not apply to the debtor's life insurance policies inasmuch as they were issued within one year of the debtor's petition date. The bankruptcy court's conclusion that the debtor had "filed bankruptcy" within the meaning of the Kansas law, however, was in error because that provision includes only voluntary petitions, not involuntary petitions under **11 U.S.C. § 303** such as the one that had been filed against

the debtor. The burden of proof under **Fed. R. Bankr. P. 4003(c)** for objecting to exemptions is discussed.

269. ***In re Novak*, BAP Nos. KS-04-25, KS-04-026, KS-04-027, KS-04-028 (10th Cir. BAP filed Apr. 14, 2004) (before McFeeley, C.J., and Michael & McNiff, JJ.) (Appeals from the United States Bankruptcy Court for the District of Kansas), *appeals dismissed*, Nos. 04-3170, 04-3171, 04-3178 & 04-3179 (10th Cir. filed Nov. 15, 2004).**

Appeals from four bankruptcy court orders were DISMISSED as being untimely under **Fed. R. Bankr. P. 8002(a)**. The Court could not extend the time to file notices of appeal under **Fed. R. Bankr. P. 8002(c)(2)**. Furthermore, **Fed. R. App. P. 4(c)** did not excuse the untimely notices of appeal.

270. ***Clark v. Deere & Co. (In re Kinderknecht)*, 308 B.R. 71 (10th Cir. BAP 2004) (Thurman, J.) (before Bohanon, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas, *reported at* 300 B.R. 47).**

A bankruptcy court judgment refusing to avoid a creditor's interests in the debtor's property pursuant to **11 U.S.C. § 544(a)(1)** was REVERSED. The creditor's financing statements, listing the debtor by his nickname, as opposed to his legal name, were insufficient to perfect its interests in the debtor's property and, therefore, the interests were avoidable under § 544(a)(1). In so doing, the court examines **U.C.C. §§ 9-502(a), 9-503(a), 9-506(b), and 9-521**.

271. ***Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, 308 B.R. 495 (10th Cir. BAP 2004) (Clark, J.) (before Clark, Michael, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico, *reported at* 289 B.R. 410), *rev'd and remanded*, 412 F.3d 1200 (10th Cir. 2005).**

A bankruptcy court judgment partially discharging the debtors' student loan debts pursuant to **11 U.S.C. § 523(a)(8)** was AFFIRMED. After the bankruptcy court entered its judgment, *Educational Credit Management Corp. v. Polleys (In re Polleys)*, 356 F.3d 1302 (10th Cir. 2004) was issued. Under *Polleys*, all of the debtors' student loan debts should have been discharged, not just the portion attributable to interest and attorneys' fees that had been discharged by the bankruptcy court. The debtors, however, did not appeal the portion of the bankruptcy court's judgment refusing to discharge the principal debt and, therefore, the Court lacked jurisdiction to reverse that portion of the judgment--it could only affirm the portion of the judgment that discharged the interest and fees. Because the entire debt should have been discharged, the Court refused to address the propriety of partial discharges under § 523(a)(8).

272. ***In re Gilchrist*, 309 B.R. 404, 2004 WL 875522, BAP No. WO-03-095 (10th Cir. BAP filed Apr. 23, 2004) (McNiff, J.) (before Clark, Nugent, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order denying the debtor's motion to dismiss her Chapter 13 case and granting the motions of the Chapter 13 trustee and a former Chapter 7 trustee to convert the case to Chapter 7 for "cause" pursuant to **11 U.S.C. § 1307(c)** was AFFIRMED. The former Chapter 7 trustee was a "party in interest" who had **standing** to object to the debtor's motion to dismiss and request that her Chapter 13 case be converted to Chapter 7. The bankruptcy court did not abuse its discretion under § 1307(c) in converting the debtor's Chapter 13 case to Chapter 7, rather than dismissing the case.

273. ***In re Armstrong*, 309 B.R. 404, 2004 WL 1040693, BAP No. UT-03-059 (10th Cir. BAP filed May 6, 2004) (McNiff, J.) (before Nugent, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *appeal dismissed*, Nos. 04-4123, 04-4127 (10th Cir. Mar. 22, 2005).**

A bankruptcy court order approving settlement agreements between the Chapter 11 trustee and certain law firms pursuant to **Fed. R. Bankr. P. 9019** was AFFIRMED, and the Appellee-trustee's motion to dismiss the appeal was DENIED.

274. ***In re Bartmann*, 310 B.R. 663, 2004 WL 1057662, BAP No. NO-03-078 (10th Cir. BAP filed May 10, 2004) (McFeeley, C.J.) (before McFeeley, C.J., and Brown & Campbell, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court order converting the debtors' Chapter 11 case to Chapter 7 for "cause" pursuant to **11 U.S.C. § 1112(b)(1)** was AFFIRMED. The bankruptcy court did not abuse its discretion in converting the case, as opposed to appointing a trustee pursuant to 11 U.S.C. § 1104.

275. ***In re Miller*, BAP Nos. UT-04-043 & UT-04-044 (10th Cir. BAP filed May 10, 2004) (before McFeeley, C.J., and Michael & Nugent, JJ.) (Appeals from the United States Bankruptcy Court for the District of Utah), *appeals dismissed*, Nos. 04-4128 & 04-4129 (10th Cir. filed Oct. 20 & Oct. 25, 2004).**

Emergency motions filed by the debtor-appellant in two appeals were DENIED. The relief requested in both motions was not properly before the Court. To the extent the debtor-appellant was seeking a stay pending appeal under **Fed. R. Bankr. P. 8005**, he was not entitled to such relief. The Court *sua sponte* imposed **filing restrictions** against the debtor-appellant pursuant to **28 U.S.C. § 1651(a)**.

276. ***Rupp v. Kunz (In re Kunz)*, 309 B.R. 795 (10th Cir. BAP 2004) (per curiam) (before Nugent, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *aff'd*, 124 F. App'x 597 (10th Cir. 2005).**

A bankruptcy court order dismissing an adversary proceeding pursuant to **Fed. R. Bankr. P. 7012(b)(6)** was AFFIRMED. The bankruptcy court did not err in determining pursuant to **11 U.S.C. § 541(c)(2)** and *Patterson v. Shumate*, 504 U.S. 753 (1992) that the

right to withdraw funds from an ERISA-qualified retirement plan was not property of the estate.

277. ***In re Armstrong*, 309 B.R. 799 (10th Cir. BAP 2004) (Nugent, J.) (before Nugent, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *appeal dismissed*, Nos. 04-4127 (10th Cir. Mar. 22, 2005).**

A bankruptcy court order imposing **filing restrictions** against the Chapter 11 debtor pursuant to **11 U.S.C. § 105** and **28 U.S.C. § 1651(a)** was AFFIRMED. The bankruptcy court did not abuse its discretion in imposing the filing restrictions and, in fact, it had a clear duty to take actions necessary to regulate the litigious debtor's access to the court for the good of the parties and the court alike. The right of **access to the courts** is not absolute or conditional. The Court also issued a *sua sponte* order pursuant to § 1651(a) imposing filing restrictions conditioning the debtor's future litigation before it.

278. ***In re Kopexa Realty Venture Co.*, 310 B.R. 663, 2004 WL 1170526, BAP No. KS-03-082 (10th Cir. BAP filed May 25, 2004) (Cornish, J.) (before Clark, Cornish, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

An appeal from a bankruptcy court's order granting a motion to participate in a hearing and an order denying a motion to amend the participation order was DISMISSED. The appellants lack **standing** to appeal because they were not "persons aggrieved" by the bankruptcy court's orders.

279. ***In re Kopexa Realty Venture Co.*, 310 B.R. 663, 2004 WL 1170565, BAP No. KS-03-083 (10th Cir. BAP filed May 25, 2004) (Cornish, J.) (before Clark, Cornish, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

An appeal from a bankruptcy court order approving a final report and an order denying a motion for reconsideration was DISMISSED. One of the appellants lacked **standing** to appeal because she was not a "person aggrieved" by the orders appealed. In addition, the appeal was **moot** because the remaining appellant failed to obtain a stay pending appeal and distributions had been made as provided in the approved final report. The order approving the final report was not void because the appellant was not denied **due process**. Even if the court considered the merits of the appeal, the bankruptcy court did not abuse its discretion in approving the final report, and the appellant's objections were no more than an improper **collateral attack** of earlier final orders. Furthermore, the appellant failed to present any grounds for reconsideration under **Fed. R. Bankr. P. 9023 or 9024**.

280. ***A.C. Rentals, Inc. v. Hough (In re A.C. Rentals, Inc.)*, 310 B.R. 663, 2004 WL 1182254, BAP No. WO-03-096 (10th Cir. BAP filed May 28, 2004) (Nugent, J.) (before Nugent, McNiff, & Thurman, JJ.) (Appeal from the United States**

Bankruptcy Court for the Western District of Oklahoma), *appeal dismissed*, No. 04-6212 (10th Cir. filed Oct. 26, 2006).

A bankruptcy court judgment avoiding a lien against the debtor's real property pursuant to **11 U.S.C. § 544(a)(3)** was AFFIRMED.

281. ***In re Miller*, BAP No. UT-04-030 (10th Cir. BAP filed June 4, 2004) (before McFeeley, C.J., and Michael & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *appeal dismissed*, No. 04-4157 (10th Cir. filed Oct. 25, 2004).**

An emergency motion to reinstate appeal that had been dismissed for lack of prosecution was DENIED. A ***pro se* party** is not excused from complying with procedural requirements.

282. ***In re Crowder*, 314 B.R. 445 (10th Cir. BAP 2004) (before Clark, Michael, & Nugent, JJ.) (Appeals from the United States Bankruptcy Court for the District of New Mexico).**

A motion to dismiss appeals from a bankruptcy court order approving a sale of water rights pursuant to **11 U.S.C. § 363(m)** was GRANTED and the appeals were DISMISSED. The appellants **waived the argument** that § 363(m) did not apply on the basis that there was not a good faith purchaser because they failed to attack the purchaser's good faith standing below. Even if the appellants had preserved the issue of good faith for appeal, the record demonstrated that the bankruptcy court's finding of fact that the water rights were purchased in good faith was not clearly erroneous.

283. ***Redmond v. Diversified Techs., Inc. (In re PII, Inc.)*, 314 B.R. 904, 2004 WL 1402691, BAP Nos. KS-03-068 & KS-03-072 (10th Cir. BAP filed June 22, 2004) (McNiff, J.) (Clark, J., concurring in part and dissenting in part) (before Clark, Cornish, & McNiff, JJ.) (Appeals from the United States Bankruptcy Court for the District of Kansas, *reported at* 294 B.R. 380 (Bankr. D. Kan. 2003)).**

A bankruptcy court order abstaining from hearing a wrongful garnishment cause of action pursuant to **28 U.S.C. § 1334(c)(1)** was AFFIRMED**,** but its order denying a preference cause of action without prejudice was REVERSED and the matter was REMANDED.

284. ***Lang v. Lang (In re Lang)*, BAP No. UT-03-070 (10th Cir. BAP filed June 25, 2004) (before McFeeley, C.J., and Michael & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *appeal dismissed*, No. 04-4162 (10th Cir. filed Nov. 22, 2004**).

Appellant's motion for an extension of time to appeal an order of the Court to the Court of Appeals for the Tenth Circuit was DENIED because she failed to show "**excusable**

neglect" or "good cause" within the meaning of **Fed. R. App. P. 4(a)(5)(A)**.

285. ***First Nat'l Bank v. Davison (In re Davison)*, 2004 WL 2852352, BAP No. KS-04-013 (10th Cir. BAP filed June 29, 2004) (Bohanon, J.) (before Bohanon, Cornish, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas, *reported at* 296 B.R. 841 (Bankr. D. Kan. 2003)).**

A bankruptcy court summary judgment denying the Chapter 7 debtors' discharge pursuant to **11 U.S.C. § 727(a)(4)(A)** was AFFIRMED where the debtors failed to deny the plaintiff's circumstantial evidence that they knowingly and fraudulently made a false oath about a material fact.

286. ***In re Vaughan*, 311 B.R. 573 (10th Cir. BAP 2004) (Brown, J.) (before McFeeley, C.J., and Brown & Campbell, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *aff'd*, 241 F. App'x 478 (10th Cir. 2007).**

A bankruptcy court order avoiding a judicial lien against the debtors' exempt homestead pursuant to **11 U.S.C. § 522(f)** was AFFIRMED. The lien, which was filed postpetition by a creditor with a nondischargeable claim against the debtors, was not immune from avoidance under § 522(f) because that section is not limited to prepetition liens. Furthermore, **11 U.S.C. § 522(c)** expressly states that exempt property is liable for certain types of nondischargeable debts, but not debts excepted from discharge under § 523(a)(2). The creditor's claim for fees and costs related to the § 523(a)(2) action was a prepetition claim and, therefore, to the extent that the lien was filed to collect that debt, it was for a prepetition debt that was avoidable under § 522(f). In so holding, the Court broadly interpreted "claim" in 11 U.S.C. § 101(5)(A). The Bank's lien was not a consensual lien under **11 U.S.C. § 101(51)**, but rather a "judicial lien" within the meaning of **11 U.S.C. § 101(36)** that could be avoided under § 522(f). The Court held that several of the Bank's arguments had been **waived on appeal** because they had not been raised below. It also refused to reconsider a previous decision of another Panel of the Court, because that decision was **controlling authority** to which the Court was bound.

287. ***Saffa v. Wallace (In re Wallace)*, 314 B.R. 904, 2004 WL 1664060, BAP No. NO-04-022 (10th Cir. BAP filed July 19, 2004) (per curiam) (before McFeeley, C.J., and Clark & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

An appeal from a bankruptcy court order granting a motion for a preliminary injunction against the Chapter 7 debtor was DISMISSED for lack of jurisdiction because it was **moot** inasmuch as the preliminary injunction was no longer in effect as a permanent injunction had issued. *See* *Saffa v. Wallace (In re Wallace)*, 316 B.R. 743 (10th Cir. 2004) [294] (appeal of permanent injunction).

288. ***In re Campbell*, 313 B.R. 313 (10th Cir. BAP 2004) (Thurman, J.) (before Michael, Thurman, & Weaver, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order denying a Chapter 13 debtor's claimed homestead exemption was VACATED as a **void judgment**. The bankruptcy court lacked subject matter jurisdiction to enter the order because the parties agreed that it would have no affect on the debtor's Chapter 13 case. In so holding, the Court held that the time to object to the debtor's claimed exemption under **Fed. R. Bankr. P. 4003(b)** would recommence if the debtor's Chapter 13 case were ever converted to Chapter 7 and, therefore, there was no reason for the bankruptcy court to determine the allowance exemption in the Chapter 13 case. Under **11 U.S.C. § 348(a)**, the conversion of case constitutes an order for relief and, therefore, a new meeting of creditors must be called under **11 U.S.C. § 341(a)** and **Fed. R. Bankr. P. 2003(a)**. The Rule 4003(b) objection period runs from the conclusion of the meeting of creditors, with no qualification that it be limited to the initial meeting. Accordingly, under Rule 4003(b), parties have thirty days from the conclusion of the meeting of creditors in the converted case to object to claimed exemptions. **11 U.S.C. § 522(l)**, which revests exempt property in the debtor, does not compel a different result because revested property, whether under § 522(l) or **11 U.S.C. § 1327(b)**, becomes property of the estate in the converted case under **11 U.S.C. § 348(f)** if it is still in the debtor's possession or control. **Fed. R. Bankr. P. 1019(2)**, which resets certain time periods upon conversion but does not mention the Rule 4003(b) period, also does not compel a different result because that Rule is silent on exemptions and cannot override more explicit provisions. The recommencement of the Rule 4003(b) objection period is supported by principles of federal jurisdiction and policy considerations. Chapter 13 trustees have little incentive to object to exemption claims because such claims do not affect the Chapter 13 case, other than under the best interests of creditors test set forth in **11 U.S.C. § 1325(a)(4)**. Resetting the Rule 4003(b) period also is not unfair to debtors.

289. ***In re Davis*, 314 B.R. 904, 2004 WL 1950423, BAP No. NO-04-029 (10th Cir. BAP filed Aug. 26, 2004) (Nugent, J.) (before Nugent, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court order denying the debtor's motion to avoid his former spouse's lien against his exempt home pursuant to **11 U.S.C. § 522(f)(1)** was AFFIRMED. Section 522(f)(1)(A) did not apply under *Farrey v. Sanderfoot*, 500 U.S. 291 (1991).

290. ***In re Campbell*, 313 B.R. 871 (10th Cir. BAP 2004) (Nugent, J.) (before McFeeley, C.J., and Nugent & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A bankruptcy court order denying the debtors' motion to convert their Chapter 13 case to Chapter 12 pursuant to **11 U.S.C. § 1307(d)** was REVERSED and the matter was REMANDED. Although Chapter 12 had expired on the debtors' petition date, the debtors were entitled to avail themselves of such relief because legislation was enacted

extending Chapter 12 retroactively to a time prior to the debtors' petition date. The bankruptcy court had authority to convert the debtor's Chapter 13 case to Chapter 12 even though Chapter 12 had again expired at the time of conversion, provided that the debtors were eligible for such relief. The petition date was the only relevant date for determining eligibility for relief, under **11 U.S.C. § 348(a)**, conversion of the case to Chapter 12 would not alter the petition date, and because of the retroactive legislation, Chapter 12 relief was effective on the debtors' petition date.

291. ***In re Busetta-Silvia*, 314 B.R. 218 (10th Cir. BAP 2004) (Michael, J.) (before Michael, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico, *reported at* 300 B.R. 543 (Bankr. D. N.M. 2003) & *motion for reconsideration denied at* 308 B.R. 537 (Bankr. D. N.M. 2004)).**

A bankruptcy court order denying an a Chapter 13 debtor's attorney's application seeking approval of prepetition fees and costs as an administrative expense was REVERSED and the matter was REMANDED. **11 U.S.C. § 330(a)(4)(B)** unambiguously states that attorneys who represent Chapter 13 debtors are entitled to reasonable compensation incurred "in connection with the bankruptcy case." Unlike other provisions of the Bankruptcy Code, § 330(a)(4)(B) does not require that services be rendered postpetition. Since the fees and costs were allowable under § 330(a), they were administrative expenses pursuant to **11 U.S.C. § 503(b)(2)** that were entitled to first priority under **11 U.S.C. § 507(a)(1)** and to payment in full under **11 U.S.C. § 1322(b)**. Final orders under **28 U.S.C. § 158(a)(1)** discussed.

292. ***In re Keener*, 316 B.R. 766, 2004 WL 2255123, BAP No. WO-04-045 (10th Cir. BAP filed Sept. 20, 2004) (per curiam) (before Clark, Brown, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order partially disallowing a fee application of the Chapter 13 debtors' attorney was AFFIRMED. The bankruptcy court did not abuse its discretion in disallowing a portion of the attorney's fees under **11 U.S.C. § 330(a)(4)(A) & (B)**. The attorney did not provide an **adequate record for review** of the bankruptcy court's findings of fact which partially compelled affirmance.

293. ***Nelson v. Stillwater Nat'l Bank & Trust Co. (In re Ireland)*, 316 B.R. 766, 2004 WL 2340040, BAP No. WO-04-049 (10th Cir. BAP filed Oct. 18, 2004) (Thurman, J.) (before McFeeley, C.J., and Brown & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court judgment avoiding a prepetition transfer pursuant to **11 U.S.C. § 547(b)** was AFFIRMED. The debtor's transfer of funds loaned to her by a bank to pay a limited liability company's debt to the bank that she had personally guaranteed was a "transfer of an interest of the debtor in property" within the meaning of § 547(b) and **11 U.S.C. § 101(54)**. It was immaterial that the debtor never had physical control of the funds loaned to her by the bank, and the debtor's personal loan, from which she procured

the funds transferred to the bank, was not a renewal of the company's debt to the bank.

294. ***Saffa v. Wallace (In re Wallace)*, 316 B.R. 743 (10th Cir. BAP 2004) (McFeeley, C.J.) (before McFeeley, C.J., and Clark & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court default judgment, instituting a permanent injunction against the *pro se* Chapter 7 debtor, was AFFIRMED. **Fed. R. Bankr. P. 7005(c)** states that default judgments may be set aside under **Fed. R. Civ. P. 60(b)**, made applicable in bankruptcy under **Fed. R. Bankr. P. 9024**. The default judgment was not a **void judgment** because the bankruptcy court had personal jurisdiction over the debtor when he was properly served with all relevant papers pursuant **Fed. R. Bankr. P. 7004(b) and 7005**. *See* *Saffa v. Wallace (In re Wallace)*, 314 B.R. 904, 2004 WL 1664060, BAP No. NO-04-022 (10th Cir. BAP filed July 19, 2004) (per curiam) [287] (dismissing appeal from order instituting preliminary injunction).

295. ***In re Vessa*, 2004 WL 2640350, BAP No. WY-04-012 (10th Cir. BAP filed Nov. 18, 2004) (Cornish, J.) (before Bohanon, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *appeal dismissed*, No. 04-8127 (10th Cir. July 27, 2005).**

A bankruptcy court order granting a motion for relief from the automatic stay pursuant to **11 U.S.C. § 362(d)** was AFFIRMED. The bankruptcy court did not abuse its discretion in finding "cause" to lift the stay where the debtor, as a principal of a corporation, transferred title of the movant-bank's collateral to himself and dissolved the corporation without notifying the bank shortly after the bank filed a state court action against the corporation.

296. ***Gonzales v. Nabisco Div. of Kraft Foods, Inc. (In re Furr's Supermarkets, Inc.)*, 317 B.R. 423 (10th Cir. BAP 2004) (Michael, J.) (before Bohanon, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico), *appeal dismissed*, No. 04-2352 (10th Cir. Feb. 18, 2005).**

A bankruptcy court order reducing the debtor's food supplier's preference liability was AFFIRMED. It correctly applied **11 U.S.C. § 547(c)(4)** to credit the supplier for new value that it had extended the debtor during the 90 days preceding the filing of its Chapter 11 petition in the way of new food product. The bankruptcy court properly refused to reduce that amount by the amount of credits that the debtor received when it returned out-dated food to the supplier. Although the debtor received a credit from the supplier for its return of food, it was undisputed that the food in fact had no value. Accordingly, the debtor's return of the food was not an avoidable transfer subsequent to the supplier's extension of new value that would result in the reduction of new value under § 547(c)(4)(B). Some **issues were waived** because they had not been raised below.

297. ***In re Laufenberg*, 2004 WL 2731670, BAP No. KS-04-053 (10th Cir. BAP filed Nov. 30, 2004) (Michael, J.) (before Cornish, Michael, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order granting a creditor relief from the automatic stay pursuant to **11 U.S.C. § 362(d)** was AFFIRMED. The bankruptcy court did not abuse its discretion in granting relief from the automatic stay where the debtors consented to such relief. The automatic stay in **11 U.S.C. § 362(a)** does not apply to protect nondebtors, and debtors may stipulate to the lifting of the stay. The equitable doctrine of **marshaling** did not apply.

298. ***McCain Foods USA, Inc. v. Shore (In re Shore)*, 317 B.R. 536 (10th Cir. BAP 2004) (Cornish, J.) (before Cornish, Michael, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court judgment excepting a debt from discharge pursuant to 11 U.S.C. § 523(a)(6) was AFFIRMED. The court did not err in applying the **collateral estoppel** to bar relitigation of a state court judgment.

299. ***In re Albrecht*, 2004 WL 2852347, BAP No. UT-04-023 (10th Cir. BAP filed Dec. 9, 2004) (McFeeley, C.J.) (before McFeeley, C.J., and Bohanon & Brooks, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

An appeal from an order extending the time to object to the debtor's discharge was DISMISSED because it was **moot**.

300. ***In re Mersmann*, 318 B.R. 537 (10th Cir. BAP 2004) (Thurman, J.) (before Cornish, Michael, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas, *reported at* 305 B.R. 42 (Bankr. D. Kan. 2004)), *aff'd*, 505 F.3d 1033 (10th Cir. 2007).**

A bankruptcy court judgment (1) denying a motion by a student loan creditor pursuant to Fed. R. Civ. P. 60(b) and **Fed. R. Bankr. P. 9024** to amend the debtor's confirmed plan discharging otherwise nondischargeable student loan debt as an undue hardship under **11 U.S.C. § 523(a)(8)**; and (2) granting the debtor's motion pursuant to Fed. R. Civ. P. 60(a) and Rule 9024 to amend a conflicting form order excepting the same debt from discharge, was AFFIRMED.

Although the procedure used by the debtor to discharge the debt was improper, under *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999), the creditor was barred under principles of ***res judicata***, from attacking the confirmed plan. Furthermore, limitations in *Poland v. Educational Credit Management Corp. (In re Poland)*, 382 F.3d 1185 (10th Cir. 2004) on the application of *Andersen* did not apply because the debtor's plan contained an express "finding" of undue hardship. *Andersen*, despite being harshly criticized in *Poland*, was **controlling authority** because one panel

of the Tenth Circuit cannot overrule the decision of another panel. It was irrelevant under the *Andersen* analysis that the "finding" of undue hardship was made when the debtor's confirmed plan was amended pursuant to **11 U.S.C. § 1329.** The debtor's failure to serve the creditor with a summons and § 523(a)(8) complaint did not result in a denial of due process because, under *Andersen*, service of the various notices in accordance with **Fed. R. Bankr. P. 2002** was sufficient.

The Court made clear that the proper procedure for obtaining a hardship discharge under § 523(a)(8) was to commence an adversary proceeding, and it warned that *Andersen* should not be used as "a tool for Chapter 13 debtors to surreptitiously obtain a hardship discharge by confirmation." In fact, the Court stated that through its holding and *Poland*, "Chapter 13 debtors are considered warned that the insertion of 'undue hardship' findings in a plan or confirmation order, or any order amending the plan or confirmation order, is never appropriate and may be grounds for setting such findings aside and/or sanctions." *See infra related appeals, Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, 318 B.R. 532 (10th Cir. BAP 2004) [301]; *In re Seiwert*, 2004 WL 2896942, BAP No. KS-04-016 (10th Cir. BAP filed Dec. 14, 2004) [302]; *Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, 2004 WL 2896940, BAP No. KS-04-015 (10th Cir. BAP filed Dec. 14, 2004) [303].

301. ***Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, 318 B.R. 532 (10th Cir. BAP 2004) (Thurman, J.) (before Cornish, Michael, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas, *reported at* 305 B.R. 42 (Bankr. D. Kan. 2004)), *appeal dismissed*, No. 05-3019 (10th Cir. Mar. 29, 2005).**

A bankruptcy court judgment discharging the debtors' unpaid student loan debt based on a provision in their confirmed Chapter 13 plan stating that the debt was discharged was REVERSED. The confirmed plan did not contain an express "finding" of "undue hardship" under **11 U.S.C. § 523(a)(8)** and, therefore, under *Poland v. Educational Credit Management Corp. (In re Poland)*, 382 F.3d 1185 (10th Cir. 2004), the discharge provision was not binding on the student loan creditor. The debtors could only seek discharge of their student loan debt by commencing an adversary proceeding pursuant to § 523(a)(8), and proving undue hardship by a preponderance of the evidence. *See supra related appeal In re Mersmann*, 318 B.R. 537 (10th Cir. BAP 2004) [300]; & *infra related appeals In re Seiwert*, 2004 WL 2896942, BAP No. KS-04-016 (10th Cir. BAP filed Dec. 14, 2004) [302]; *Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, 2004 WL 2896940, BAP No. KS-04-015 (10th Cir. BAP filed Dec. 14, 2004) [303].

302. ***In re Seiwert*, 2004 WL 2896942, BAP No. KS-04-016 (10th Cir. BAP filed Dec. 14, 2004) (Cornish, J.) (before Cornish, Michael, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas, *reported at* 305 B.R. 42 (Bankr. D. Kan. 2004)), *aff'd*, 505 F.3d 1033 (10th Cir. 2007).**

A bankruptcy court judgment discharging a portion of the debtor's unpaid student loan debt based on a provision in her confirmed Chapter 13 plan stating that the debt was

discharged was REVERSED. The confirmed plan did not contain an express "finding" of "undue hardship" under **11 U.S.C. § 523(a)(8)** and, therefore, under *Poland v. Educational Credit Management Corp. (In re Poland)*, 382 F.3d 1185 (10th Cir. 2004), the discharge provision was not binding on the student loan creditor. The debtor could only seek discharge of student loan debt by commencing an adversary proceeding pursuant to § 523(a)(8), and proving undue hardship by a preponderance of the evidence. *See supra related appeals* *In re Mersmann*, 318 B.R. 537 (10th Cir. BAP 2004) [300]; *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, 318 B.R. 532 (10th Cir. BAP 2004) [301]; *& infra related appeal* *Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, 2004 WL 2896940, BAP No. KS-04-015 (10th Cir. BAP filed Dec. 14, 2004) [303].

303. ***Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*** **2004 WL 2896940, BAP No. KS-04-015 (10th Cir. BAP filed Dec. 14, 2004) (Cornish, J.) (before Cornish, Michael, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas*, reported at* 305 B.R. 42 (Bankr. D. Kan. 2004)).**

A bankruptcy court judgment discharging a portion of the debtors' unpaid student loan debt based on a provision in their confirmed Chapter 13 plan stating that the debt was discharged was REVERSED and the case was REMANDED. The confirmed plan did not contain an express "finding" of "undue hardship" under **11 U.S.C. § 523(a)(8)** and, therefore, under *Poland v. Educational Credit Management Corp. (In re Poland)*, 382 F.3d 1185 (10th Cir. 2004), the discharge provision was not binding on the student loan creditor. The debtors could only seek discharge of student loan debt by commencing an adversary proceeding pursuant to § 523(a)(8), and proving undue hardship by a preponderance of the evidence. *See supra related appeals* *In re Mersmann*, 318 B.R. 537 (10th Cir. BAP 2004) [300]; *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, 318 B.R. 532 (10th Cir. BAP 2004) [301]; *In re Seiwert*, 2004 WL 2896942, BAP No. KS-04-016 (10th Cir. BAP filed Dec. 14, 2004) [302].

304. ***Se. Med. Labs., Inc. v. Andarakes (In re Andarakes)*****, 2004 WL 2905325, BAP No. WO-04-062 (10th Cir. BAP filed Dec. 16, 2004) (per curiam) (before Clark, Nugent, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court judgment dismissing a complaint against the Chapter 7 debtor was AFFIRMED. The plaintiff-creditor failed to prove embezzlement or larceny within the meaning of **11 U.S.C. § 523(a)(4)**, or that the debtor's debt to it was a result of a "willful and malicious injury" within the meaning of **11 U.S.C. § 523(a)(6)**. Certain issues not raised in the bankruptcy court were deemed **waived on appeal**.

305. ***Taylor v. Hazboun (In re Hazboun)*****, 319 B.R. 747, 2004 WL 3008941, BAP No. UT-04-033 (10th Cir. BAP filed Dec. 29, 2004) (per curiam) (before McFeeley, C.J., and Bohanon & Brooks, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court judgment awarding the Chapter 7 debtor attorney's fees and costs pursuant to **11 U.S.C. § 523(d)** was REVERSED. Test and standard of review for "substantial justification" discussed.

306. ***In re Yates*, 2005 WL 50188, BAP No. WY-04-036 (10th Cir. BAP filed Jan. 11, 2005) (per curiam) (before Bohanon, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order awarding the Chapter 13 debtors attorney's fees resulting from a creditor's willful violation of the automatic stay under **11 U.S.C. § 362(h)** was VACATED and the matter was REMANDED to the bankruptcy court. Although the order did not set the amount of the fees, it was a "final" order over which the Court could exercise jurisdiction under **28 U.S.C. § 158(a)(1)**. Appellate review of the order, however, was not possible because the bankruptcy court did not make any findings of fact as required under **Fed. R. Bankr. P. 7052 & 9014**.

307. ***In re Schoenhals*, 2005 WL 83836, BAP No. WO-04-070 (10th Cir. BAP filed Jan. 14, 2005) (per curiam) (before McFeeley, C.J., and Clark & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order disallowing a secured claim asserted against the Chapter 12 debtors was AFFIRMED. The creditor's **mechanic's lien** against the debtors' tractor was extinguished when he voluntarily restored possession of the tractor to the debtors.

308. ***In re Harmsen*, 320 B.R. 188 (10th Cir. BAP 2005) (Brooks, J.) (before McFeeley, C.J., and Bohanon & Brooks, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *appeal dismissed*, No. 05-4041 (10th Cir. May 24, 2005).**

A bankruptcy court order dismissing creditor's involuntary Chapter 7 petition, after trial, was AFFIRMED. The bankruptcy court properly applied the "totality of the circumstances" test, adopted in *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540 (10th Cir. 1988), in connection with its finding that debtor was "generally paying his debts on time" under **11 U.S.C. § 303(h)(1)**, and such finding was not clearly erroneous. The facts that case was brought by a single creditor and no other creditors joined in were considered by bankruptcy court as part of its totality determination, and were not suggestive of application of the "Almost Per Se" rule, in violation of *Bartmann*. Creditor failed to meet its burden of demonstrating that debtor was not paying debts on time.

309. ***Tanner v. Barber (In re Barber)*, 326 B.R. 463 (10th Cir. BAP 2005) (McFeeley, C.J.) (before McFeeley, C.J., and Clark & Bohanon, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court's summary judgment, finding creditors' debts nondischargeable under **11 U.S.C. § 523(a)(2)**, was AFFIRMED. Debt that is nondischargeable under

§ 523(a)(2)(A) is not limited to the actual amount that debtor obtains through fraud, but includes punitive and compensatory damages. Where the bankruptcy judgment only determines that a debt is nondischargeable, and does not assess the amount of the debt, **Fed. R. Bankr. P. 7008** and **7009** do not require that damages be pled with particularity in the adversary complaint.

310. ***Pritner v. Cofco Credit Co., LLC (In re Pritner),* 323 B.R. 802, 2005 WL 705363, BAP No. WO-04-080 (10th Cir. BAP filed Mar. 21, 2005) (Nugent, J.) (before Nugent, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *appeal dismissed*, No. 05-6165 (10th Cir. Nov. 14, 2005).**

A bankruptcy court judgment dismissing debtors' complaint against creditor for violation of automatic stay was REVERSED and REMANDED. In a "no asset" Chapter 7 proceeding, creditor was not prejudiced by discharge of its pre-petition debt, even though debt was not scheduled and creditor did not receive notice of the bankruptcy proceedings. Pursuant to *In re Parker*, 313 F.2d 1267 (10th Cir. 2002), **11 U.S.C. § 523(a)(3)(A)** does not except unscheduled debts from discharge in no asset cases where no proof of claim deadline is set. Moreover, equitable arguments, such as laches, similarly do not affect dischargeability. Thus, under **11 U.S.C. § 524(a)**, creditor's state court judgment on its debt was void as a matter of law. Debtors' conduct is only relevant, on remand, in determining the extent of their remedies for creditor's violation of the automatic stay, which must at least include repayment of wages that were garnished pursuant to a void judgment.

311. ***In re Musgrove*, 2005 WL 977076, BAP No. EO-05-002 (10th Cir. BAP filed Apr. 26, 2005) (Thurman, J.) (before McFeeley, C.J., and Nugent & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A bankruptcy court order denying debtor's request for relief from a stipulated judgment was AFFIRMED. The bankruptcy court did not abuse its discretion in denying debtor's Fed. R. Civ. P. 60(b) motion, since debtor failed to present evidence to support his claim that his attorney acted without authority in entering the stipulated judgment.

312. ***In re AC Rentals, Inc.*, 325 B.R. 339, 2005 WL 1220496, BAP No. WO-04-098 (10th Cir. BAP filed May 12, 2005) (per curiam) (before Clark, Brown, & McNiff, JJ.) (Appeal from the United State Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order dismissing debtor's Chapter 11 case was AFFIRMED. The bankruptcy court did not abuse its discretion in dismissing case pursuant to **11 U.S.C. § 1112(b)**, since debtor admitted "cause" under that section and failed to present evidence that conversion, rather than dismissal, was in the best interest of its creditors.

313. ***In re Whiting*, 325 B.R. 339, 2005 WL 1220494, BAP No. UT-04-052 (10th Cir. BAP**

filed May 19, 2005) (Brown, J.) (before Cornish, Nugent, & Brown, JJ.) (Appeal from the United State Bankruptcy Court for the District of Utah).

A bankruptcy court order authorizing sale of estate property to a third party was VACATED and the matter was REMANDED to the bankruptcy court. Approval of Trustee's sale of debtors' claims against third party to that third party did not include an independent evaluation of the settlement, as required by *In re Kopexa Realty Venture*, 213 B.R. 1020 (10th Cir. BAP 1997) and **Fed. R. Bankr. P. 9019**, where trial court determined only that Trustee had properly considered the factors. In addition, a finding of good faith was required where Trustee's sale motion dictated bankruptcy court's prior approval of purchaser as "good faith purchaser, satisfying the requirements of **11 U.S.C. § 363(m)**," and trial court erred in failing to make any such finding with respect to actual purchaser. Remand for a determination of good faith is appropriate even when that issue is raised for the first time on appeal.

314. ***In re Myers*, 329 B.R. 358, 2005 WL 1324019, BAP No. KS-04-054 (10th Cir. BAP filed May 25, 2005) (per curiam) (before Bohanon, Cornish, & Brown, JJ.) (Appeal from the United State Bankruptcy Court for the District of Kansas), *aff'd*, 183 F. App'x 738 (10th Cir. 2006).**

A bankruptcy court order dismissing debtor's Chapter 11 petition over appellant's objection was AFFIRMED. Bankruptcy courts have broad discretion to either convert or dismiss cases under **11 U.S.C. § 1112(b)**, and debtor's failure to file monthly reports required by **Fed. R. Bankr. P. 2015(a)(3)** was sufficient justification for dismissal.

315. ***In re Bartmann*, 329 B.R. 358, 2005 WL 1324016, BAP No. NO-04-096 (10th Cir. BAP filed May 25, 2005) (per curiam) (before Nugent, Brown, & Thurman, JJ.) (Appeal from the United State Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court order denying debtors' motion for extension of time to file a notice of appeal from court's prior easement order was AFFIRMED. Bankruptcy court did not abuse its discretion in finding that debtors' counsel's failure to read the appropriate rules was not "**excusable neglect**" under **Fed. R. Bankr. P. 8002**.

316. ***In re Bartmann*, 330 B.R. 880, 2005 WL 1244812, BAP No. NO-04-095 (10th Cir. BAP filed May 25, 2005) (per curiam) (before Nugent, Brown, & Thurman, JJ.) (Appeal from the United State Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court order denying debtors' motion for extension of time to file a notice of appeal from court's prior order granting trustee's objection to debtors' amended schedule was AFFIRMED. In a related case, *Bartmann v. Malloy (In re Bartmann)*, 329 B.R. 358, 2005 WL 1324016, BAP No. NO-04-096 (10th Cir. BAP filed May 25, 2005) [315] this court found that bankruptcy court did not abuse its discretion in finding that debtors'

counsel's failure to read the appropriate rules was not "**excusable neglect**" under **Fed. R. Bankr. P. 8002**. The same reasoning applies here.

317. ***Countrywide Home Loans v. Davis (In re Davis)*, 325 B.R. 339, 2005 WL 1278096, BAP No. WO-04-057 (10th Cir. BAP filed May 26, 2005) (McNiff, J.) (before McFeeley, C.J., and Clark & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *aff'd*, 188 F. App'x 671 (10th Cir. 2006).**

A bankruptcy court's summary judgment order allowing creditor's adversary action to proceed was REVERSED and the case was REMANDED for dismissal. Where previous trial judge denied creditor's request to either modify confirmation of debtor's plan or require an adversary proceeding to determine validity of creditor's lien, on the basis that they were barred by creditor's failure to appeal or to otherwise timely seek relief from confirmation, principles of ***res judicata*** barred creditor's subsequent adversary proceeding seeking the same relief.

318. ***In re InteliQuest Media Corp.*, 326 B.R. 825 (10th Cir. BAP 2005) (Nugent, J.) (before Cornish, Nugent, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order denying debtors' and their attorneys' motion to compel on the basis of ***res judicata*** was AFFIRMED. Appellants sought to compel Trustee to pursue their attorneys' fees and costs as surcharges against secured creditor's collateral, pursuant to **11 U.S.C. § 506(c)**. All § 506(c) claims had previously been the subject of several post-petition stipulated waivers between Trustee and creditor These waivers were approved by the bankruptcy court, over appellants' objections, in orders appellants did not appeal. Post-petition waivers of § 506(c) claims, approved and embodied in orders, are enforceable under principles of ***res judicata***. Appellants' claims for professional compensation were properly administrative expenses under **11 U.S.C. § 503**, which are assessed against the estate as a whole, rather than § 506(c) surcharges, which are assessed against a secured party's collateral for a particular benefit received by that creditor.

319. ***First Nat'l Bank v. Cribbs (In re Cribbs)*, 327 B.R. 668 (10th Cir. BAP June 24, 2005) (McNiff, J.) (before Clark, Nugent, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *aff'd*, 2006 WL 1875366, No. 05-6225 (10th Cir. July 7, 2006).**

A bankruptcy court's judgment that debt was dischargeable was AFFIRMED. Bankruptcy court's findings under **11 U.S.C. § 523(a)(2)(B)** that (1) debtor acted without intent to deceive, (2) that lender did not actually rely on debtor's erroneous financial statement, and (3) that any reliance was not reasonable were supported by the record and not clearly erroneous. Intent is a subjective inquiry, and *Central Nat'l Band and Trust Co. v. Liming (In re Liming)*, 797 F.2d 895 (10th Cir. 1986) does not impose an objective standard of recklessness.

320. ***Azwar v. Tex. Guaranteed Student Loan Corp. (In re Azwar)*, 326 B.R. 165 (10th Cir. BAP 2005) (Nugent, J.) (before Clark, Nugent, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court judgment discharging debtor's student loan pursuant to the "undue hardship" provision in **11 U.S.C. § 523(a)(8)** was REVERSED. Debtor failed to satisfy his burden to prove "undue hardship," as defined in *Educational Credit Management Corp. v. Polleys (In re Polleys)*, 356 F.3d 1302 (10th Cir. 2004). Specifically, debtor failed to provide evidence to establish that (1) his inability to pay his student loans was likely to persist, and (2) his efforts to repay the loans were in good faith.

321. ***Cline v. Cline (In re Cline)*, 2005 WL 1706119, BAP Nos. WO-04-069 & 071 (10th Cir. BAP July 20, 2005) (per curiam) (before McFeeley, C.J., and Clark & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *aff'd*, 259 F. App'x 127 (10th Cir. 2007), *cert. denied*, 128 S.Ct. 2504 (2008).**

A bankruptcy court judgment excepting a portion of debtor's divorce-related debt to his former spouse from discharge was AFFIRMED because both appellants failed to provide the court with an adequate record upon which to assess their claims of error. A designation of the trial court record is insufficient to satisfy the requirements of **Fed. R. Bankr. P. 8006 and 8009(b)** and **10th Cir. BAP L. R. 8009-1(b)** that appellant present the record to the appellate court in appendices.

322. ***In re Milk Palace Dairy, LLC*, 327 B.R. 462 (10th Cir. BAP 2005) (Boulden, J.) (before Bohanon, Cornish, & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

An appeal of a bankruptcy court order granting debtor's request to purchase real property from a related entity was DISMISSED as moot. Appellant mortgage creditor did not obtain a stay on appeal. Since entry of the order appealed, the majority of the property on which appellant held liens had been sold to third parties, and the remainder had been transferred to a non-party trust charged with operating debtor's dairy and, ultimately liquidation, under a confirmed plan of reorganization. The court is without jurisdiction to undo transfers to non-parties, and appellant's relief requests all involve at least the potential for unknown and unacceptable results impacting innocent third parties. Therefore, the appeal is both **constitutionally** and **equitably moot**.

323. ***In re Lotspeich*, 328 B.R. 209 (10th Cir. BAP 2005) (McFeeley, C.J.) (before McFeeley, C.J., and Clark & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *appeal dismissed*, No. 05-6284 (10th Cir. Feb. 13, 2006).**

Bankruptcy court orders 1) approving asset sale, and 2) confirming plan of reorganization were REVERSED and REMANDED. Order approving sale of debtor's real property to a

third party was insufficient under **11 U.S.C. § 363(m)** because it lacked findings as to whether the purchase was by a "good faith purchaser." Lack of such findings precluded appellate review, and the sale order was reversed and remanded for findings on that limited issue. Order confirming plan violated absolute priority rule of **11 U.S.C. § 1129(b)(2)(B)(ii)** because debtor retained an "interest in property," as defined by *Unruh v. Rushville State Bank*, 987 F.2d 1506 (10th Cir. 1993), despite appellees' contention that debtor's interest was equitable only and without value. Therefore, the plan could not be confirmed under 11 U.S.C. § 1129(a) or crammed down under 11 U.S.C. § 1129(b) and it should not have been approved.

324. ***Carlin v. United States of America (In re Carlin)*, 328 B.R. 221 (10th Cir. BAP 2005) (Cornish, J.) (before Bohanon, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *reported at* 318 B.R. 556 (Bankr. D. Kan. 2004).**

A bankruptcy court order finding debtor's tax debt nondischargeable was AFFIRMED. Having signed and filed joint tax returns with her non-debtor spouse, debtor was jointly and severally liable for the resulting taxes, penalties, and interest, regardless of whether she would have been required to file a return based on her income alone. Those taxes were nondischargeable under **11 U.S.C. §§ 523(a)(1)(A)** and **507(a)(8)(A)(ii)** because they were assessed within 240 days before the filing of debtor's petition. Moreover, the "240-day rule" does not include a "required return" element, and one cannot be read into the statute by the court. Neither could **11 U.S.C. § 105(a)** be exercised to negate a specific legislative mandate, such as that contained in § 507(a)(8)(A)(ii).

325. ***In re Whiting*, 329 B.R. 358, 2005 WL 1847172, BAP No. UT-05-019 (10th Cir. BAP filed Aug. 3, 2005) (Nugent, J.) (before Michael, Nugent, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order approving trustee's settlement of debtors' claims against individual third parties was AFFIRMED. The bankruptcy court did not abuse its discretion under **Fed. R. Bankr. P. 9019(a)** where approval of the settlement involved an evidentiary hearing, consideration of the standards for approval of settlements set forth in *In re Kopexa Realty Venture*, 213 B.R. 1020 (10th cir. BAP 1997), and detailed findings and conclusions that indicated the court had independently evaluated the facts. The **11 U.S.C. § 363(m)** good faith purchaser requirement was inapplicable to the bankruptcy court's approval of the settlement under Rule 9019.

326. ***Blue Ridge Bank and Trust Co. v. Cascio (In re Cascio)*, 342 B.R. 384, 2005 WL 4001131, BAP No. KS-05-016 (10th Cir. BAP filed Aug. 4, 2005) (Cornish, J.) (before Bohanon, Cornish, & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *reported at* 318 B.R. 567 (Bankr. D. Kan 2004).**

A bankruptcy court order finding debtor's obligation to lender dischargeable was AFFIRMED. Findings that financial statement provided to lender, although materially

false, 1) was not reasonably relied upon, and 2) was not given by debtor with intent to deceive, were supported by the record and not clearly erroneous. Therefore, lender failed to establish nondischargeability under **11 U.S.C. § 523(a)(2)(B).**

327. ***In re Strother*, 328 B.R. 818 (10th Cir. BAP 2005) (Brown, J.) (before McFeeley, C.J., and Brown & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A bankruptcy court order discharging contractor's liens on debtor's homestead was AFFIRMED. Although debtor's homestead exemption was defined by Oklahoma law, an "opt out" state pursuant to **11 U.S.C. § 522(b),** debtor's ability to avoid liens that impair that exemption was governed by **11 U.S.C. § 522(f)**, notwithstanding contrary state law. *Owen v. Owen*, 500 U.S. 305 (1991); *In re Leonard*, 866 F.2d 335 (10th Cir. 1989). Since contractor's claim was a judicial lien rather than a statutory lien, it was properly discharged under § 522(f)(1)(A).

328. ***Wilkins v. Hamilton (In re Wilkins)*, 329 B.R. 358, 2005 WL 1926413, BAP No. KS-04-050 (10th Cir. BAP filed Aug. 11, 2005) (Cornish, J.) (before Bohanon, Cornish, & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order dismissing debtor's Chapter 13 case without prejudice was AFFIRMED. The list of conditions for dismissal in **11 U.S.C. § 1307(c)** is not exclusive, and a Chapter 13 case may be dismissed if, under the totality of the circumstances, there has been an abuse of the provisions, purpose, or spirit of the Code. Where debtor not only gambled money beyond budgeted recreation funds in violation of trustee's and court's admonitions not to, but also lied about that gambling under oath, the trial court did not abuse its discretion by dismissing her case.

329. ***Rajala v. Majors (In re Majors)*, 330 B.R. 880, 2005 WL 2077497, BAP Nos. KS-04-093 and KS-04-097 (10th Cir. BAP Aug. 29, 2005) (Bohanon, J.) (before Bohanon, Cornish, & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order denying trustee's request for denial of discharge, but granting request for turnover of funds, was AFFIRMED. That debtor lacked the requisite intent, under either **11 U.S.C. § 727(a)(2)(B)** or **§ 727(a)(4)(A),** to deny her discharge was a finding of fact that was not clearly erroneous. Trustee simply failed to carry the burden to establish that debtor's conduct, in failing to disclose a business-related checking account and in using post-petition accounts receivable monies for business-related purposes, involved intent to defraud, rather than debtor's mistaken but subjective belief that her sole proprietorship business was separate from her personal bankruptcy estate. However, trustee was entitled to a money judgment for the value of the accounts receivable and the checking account, pursuant to **11 U.S.C. § 542**, notwithstanding debtor's claim of hardship because

the funds were no longer in her possession.

330. ***In re Derringer*, 330 B.R. 880, 2005 WL 2216327, BAP No. NM-05-020 (10th Cir. BAP filed Sept. 6, 2005) (Michael, J.) (before Michael, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico), *aff'd and remanded*, 196 F. App'x 620 (10th Cir. 2006).**

Bankruptcy court orders denying debtor's motions for "judicial notice" and for relief under Fed. R. Civ. P. 59(e) were AFFIRMED. Debtor's claims regarding the validity of appellees' state court judgments granting them injunctive and monetary relief against debtor were barred by both **res judicata** and the **Rooker-Feldman doctrine**, which precludes federal courts from reconsidering or overruling final state court judgments. Debtor's Rule 59 motion was properly denied for failure to raise any issues not previously considered by the bankruptcy court.

331. ***Johnson v. Smith (In re Johnson)*, 330 B.R. 880, 2005 WL 2300370, BAP No. WY-04-087 (10th Cir. BAP filed Sept. 7, 2005) (Michael, J.) (before Clark, Bohanon, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *aff'd*, 501 F.3d 1163 (10th Cir. 2007).**

Bankruptcy court orders finding that vehicle seller violated automatic stay, and ordering return of vehicle to debtors and delivery of its title without a lien notation were AFFIRMED. Award of damages for lost use of the vehicle was REVERSED. Award of attorney fees incurred in connection with debtors' enforcement of the automatic stay was VACATED and REMANDED for further proceedings.

Bankruptcy court's findings that vehicle sales contract was neither executory nor terminated pre-petition, and that the vehicle was property of debtors' estate were correct as a matter of law. Proper standard of proof of a claimed stay violation is "preponderance of the evidence," and bankruptcy court's factual findings supporting its legal conclusion that seller "willfully violated" the automatic stay, arising under **11 U.S.C. § 362(a)(4),** were not clearly erroneous. Seller violated the stay by attempting to perfect its lien on the vehicle post-petition and by otherwise exercising control over the vehicle itself. However, debtors' testimony that they drove their son's car 2500 miles while the purchased vehicle was unavailable to them was insufficient, standing alone, to support bankruptcy court's award of lost use damages in the amount of 37 cents per mile, absent any evidentiary basis showing either an agreement between debtors and their son for payment or the origin of the per mile figure. Finally, admission of a fees and costs statement, and the resulting **attorney fee award**, was reversible under **Fed. R. Evid. 602**, where debtors' attorney did not testify in support of it.

332. ***Loper v. Loper (In re Loper)*, 329 B.R. 704 (10th Cir. BAP 2005) (Karlin, J.) (before Clark, Brown, & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma)**.

Summary judgment in favor of debtor on her former husband's complaint seeking non-dischargeability of her debt to him, pursuant to **11 U.S.C. § 523(a)(5),** was REVERSED, and the matter was remanded for additional proceedings. Appellant's affidavit in opposition to summary judgment, though self-serving, amounted to more than a "scintilla of evidence," and was sufficient to create a genuine issue of material fact as to the parties' intent that money awarded in their divorce decree as "alimony in lieu of property division" was in fact intended to be used for "support."

333. ***In re Tahah*, 330 B.R. 777 (10th Cir. BAP 2005) (Clark, J.) (McFeeley, C.J., concurring in result) (before McFeeley, C.J., and Clark & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma)**.

A bankruptcy court order disallowing that portion of debtor counsel's fee application that was above the local guidelines' presumptively reasonable fee was REVERSED and the matter was remanded for further proceedings. **Attorney fee** reasonableness is governed by **11 U.S.C. § 330(a)(3)**, and must include an independent evaluation of the propriety of fees sought. Bankruptcy court's failure to make factual findings pursuant to § 330 prevented appellate review of the fee award.

334. ***O'Steen v. Buckner (In re Buckner)*, 337 B.R. 728, 2005 WL 2600625, BAP No. EO-05-034 (10th Cir. BAP filed Sept. 28, 2005) (McNiff, J.) (before Nugent, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A bankruptcy court judgment discharging appellants' claim against debtor, pursuant to **11 U.S.C. § 523(a)(2)(A)**, on the ground that debtor did not intend to deceive them was AFFIRMED. Intent is a question of fact reviewed for clear error, and an appellate court may not substitute its judgment for that of the trial court. Also, trial court was not required to discuss evidence not relevant to or probative of intent, and appellants failed to show either that their evidence was not considered by the trial court or that the result would have been different if it had.

335. ***In re Yates*, 332 B.R. 1 (10th Cir. BAP 2005) (Thurman, J.) (before Nugent, Thurman, & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order awarding attorney fees and costs to debtor for credit union's wilful violation of automatic stay in Chapter 13 case was AFFIRMED. The provision in **11 U.S.C. § 362(a)** that stays the exercise of control over estate property prohibits continued possession of estate property that was lawfully obtained prior to imposition of the stay, especially in light of the **11 U.S.C. § 542(a)** requirement that creditors in possession of estate property upon the filing of a bankruptcy petition turn that property over to the trustee. In addition, **11 U.S.C. § 362(h)** mandated an award of attorney fees and costs incurred in connection with creditor's refusal to turn over debtor's vehicle where creditor knew of the automatic stay and refused to comply with requests for turnover, despite

creditor's claimed subjective belief that it had a right to the property.

336. ***In re Yates*, 337 B.R. 728, 2005 WL 2499488, BAP No. WY-05-017 (10th Cir. BAP filed Oct. 4, 2005) (Romero, J.) (before Nugent, Thurman, & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order denying credit union's request for turnover of funds paid to Chapter 13 trustee by debtor prior to conversion of case to Chapter 7 was AFFIRMED because court's equitable powers under **11 U.S.C. § 105** cannot be used to override the specific requirement of **11 U.S.C. § 1326(f)(2)** that trustee return payments to debtor upon conversion.

337. ***Hansen v. Green Tree Servicing, LLC (In re Hansen)*, 332 B.R. 8 (10th Cir. BAP 2005) (Nugent, J.) (before Nugent, Thurman, & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court judgment in favor of creditor in debtor's avoidance action was REVERSED and remanded with instructions to vacate the judgment and dismiss debtor's action, on the ground that Chapter 13 debtors do not have **standing** to bring avoidance actions under **11 U.S.C. § 544(a).** Pursuant to **11 U.S.C. § 1303**, Chapter 13 debtors have only those trustee powers granted in certain subsections of 11 U.S.C. § 363. Therefore, the avoidance powers of § 544 are exclusive to the trustee.

338. ***In re Kennedy*, 336 B.R. 600, 2005 WL 2662328, BAP No. CO-05-033 (10th Cir. BAP filed Oct. 19, 2005) (Nugent, J.) (before McFeeley, C.J., and Clark & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado), *appeal dismissed*, No. 06-1010 (10th Cir. June 26, 2006).**

A bankruptcy court order sustaining trustee's objection to debtors' claimed exemption in annuity proceeds, under Colorado law, was AFFIRMED, since trustee successfully rebutted debtors' claim that the annuity statute was an exemption, and debtors failed to produce the annuity contract, which precluded adequate review of whether the contractual provisions required by the statute had been met.

339. ***In re Schubert*, 337 B.R. 728, 2005 WL 2857937, BAP No. CO-05-023 (10th Cir. BAP filed Nov. 1, 2005) (Bohanon, J.) (before McFeeley, C.J., and Bohanon & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court order imposing sanctions against debtor, related to an unsuccessful **contempt** motion against creditor, was REVERSED and remanded for further proceedings, because trial court failed both to describe the conduct upon which sanctions were based and to give an explanation for the sanctions, as required by **Fed. R. Bankr. P. 9011(c)(3).**

340. ***In re Weber*, 332 B.R. 432 (10th Cir. BAP 2005) (Romero, J.) (before Nugent, Thurman, & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the**

District of Wyoming).

A bankruptcy court order applying a "private party" valuation for debtors' redemption of a vehicle under **11 U.S.C. § 722** was REVERSED and the matter was remanded for entry of judgment allowing redemption under a foreclosure standard of valuation, which best corresponded to the agreed "trade-in" valuation in this case.

341. ***Hill v. Putvin (In re Putvin)*, 332 B.R. 619 (10th Cir. BAP 2005) (Bohanon, J.) (before Bohanon, Michael, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court's summary judgment, finding debtor's liability under state court judgment non-dischargeable pursuant to **11 U.S.C. § 523(a)(4),** was AFFIRMED. Bankruptcy Court properly concluded that both ***Rooker-Feldman*** and **collateral estoppel doctrines** precluded redetermination of state court's findings that satisfied elements of § 523(a)(4).

342. ***In re Myers*, 336 B.R. 601, 2005 WL 3115771, BAP No. KS-05-038 (10th Cir. BAP filed Nov. 16, 2005) (Cornish, J.) (before McFeeley, C.J., and Cornish & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

Debtor's appeal of bankruptcy court's order lifting automatic stay was DISMISSED as **moot**. Subsequent to appeal, debtor's Chapter 11 case was dismissed, which terminated automatic stay and rendered appellate court unable to grant any effective relief.

343. ***In re Derringer*, 336 B.R. 600, 2005 WL 3105619, BAP Nos. NM-05-077 and -097 (10th Cir. BAP Nov. 21, 2005) (Michael, J.) (before Clark, Bohanon, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico), *appeal dismissed*, No. 05-2396 (10th Cir. Mar. 22, 2006).**

A bankruptcy court award of damages for violation of automatic stay was REVERSED and REMANDED for evidentiary hearing. Damages awarded under **11 U.S.C. § 362(h)** [now § 362(k)(1)] may not be speculative, and actual damages must be proven with reasonable certainty. **Punitive damages** under § 362(h) require evidence of "egregious, intentional misconduct."

344. ***In re Derringer*, 336 B.R. 600, 2005 WL 3105613, BAP No. NM-05-068 (10th Cir. BAP filed Nov. 21, 2005) (Michael, J.) (before Bohanon, Michael, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico), *appeal dismissed*, No. 05-2378 (10th Cir. Mar. 22, 2006).**

A bankruptcy court judgment terminating the automatic stay as to appellee judgment lien holders was AFFIRMED. The bankruptcy court did not abuse its discretion by finding that debtor's failure to obtain confirmation of a Chapter 13 plan constituted sufficient "cause" to terminate the automatic stay pursuant to **11 U.S.C. § 362(d)(1)**.

345. ***Commercial Fed. Bank v. Pappan (In re Pappan)*, 334 B.R. 678 (10th Cir. BAP 2005) (Thurman, J.) (before McFeeley, C.J. & Nugent & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court judgment awarding debtors **attorney's fees** and costs incurred in their successful defense of creditor's non-dischargeability action was AFFIRMED. Bankruptcy court did not abuse its discretion in finding that creditor failed to prove either that its non-dischargeability action was "substantially justified" or that special circumstances would make such an award unjust, as required by **11 U.S.C. § 523(d)**. Since § 523(d) is based on § 2412(d)(1)(A) of the Equal Access to Justice Act (EAJA), interpretations of the phrase "substantially justified" under the EAJA govern interpretation of the same phrase in § 523(d). Creditor's total failure to investigate prior to filing its non-dischargeability action established lack of reasonable basis for the facts alleged.

346. ***In re Davis*, 336 B.R. 600, 2005 WL 3309664, BAP No. WO-05-082 (10th Cir. BAP filed Dec. 7, 2005) (McFeeley, C.J.) (before McFeeley, C.J., and Clark & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A debtor's petition for writ of **mandamus**, which was based on a previous decision by this Court, was DISMISSED as **moot,** because the BAP decision at issue had been appealed to the Tenth Circuit and was subject to a stay pending the appeal. Accordingly, no effectual relief could be granted.

347. ***Malloy v. Bank of Commerce (In re Dalton)*, 336 B.R. 600, 2005 WL 3338229, BAP No. NO-05-052 (10th Cir. BAP filed Dec. 8, 2005) (Clark, J.) (before Clark, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court judgment refusing to avoid a security interest because it was perfected prior to the debtors' petition date, was AFFIRMED. The "perfection by attachment" rule in Oklahoma's U.C.C. applies to liens on vehicles properly registered pursuant to tribal law.

348. ***Griffey v. U.S. Bank (In re Griffey)*, 335 B.R. 166 (10th Cir. BAP 2005) (Bohanon, J.) (before Bohanon, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court order dismissing debtors' complaint that sought to "strip off" a secondary mortgage on their primary residence was REVERSED and REMANDED. The U.S. Supreme Court's decision in *Nobleman v. American Savings Bank*, 508 U.S. 324 (1993), which holds that **11 U.S.C. § 1322(b)(2)** anti-modification clause bars the "stripping down" of a creditor's claim when any portion of that claim is secured, does not apply to wholly unsecured claims. Judicial valuation under **11 U.S.C. § 506(a)** will control whether a mortgagee's interest is secured, under-secured, or wholly unsecured, and only

the first two situations are governed by *Nobleman*.

349. ***Rupp v. United Sec. Bank (In re Kunz)*, 335 B.R. 170 (10th Cir. BAP 2005) (Cornish, J.) (before Cornish, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *aff'd in part*, 489 F.3d 1072 (10th Cir. 2007).**

A bankruptcy court's order on cross-motions for summary judgment was AFFIRMED in part and REVERSED in part on the ground that issues of fact precluded entry of judgment as a matter of law. The determination of whether debtor's status as a former director and current "director emeritus" of bank rendered bank an "**insider**" under **11 U.S.C. § 547(b)(4)(B)**, as defined by **11 U.S.C. § 101(31)(A)(iv)**, presented a mixed question of law and fact, even though the facts were undisputed, because reasonable minds could differ as to the control exercised by debtor over the bank. Therefore, the denial of the bank's motion for summary judgment was proper, but the granting of the trustee's similar motion was not.

350. ***In re Lacy*, 335 B.R. 729 (10th Cir. BAP 2006) (Clark, J.) (before McFeeley, C.J., and Clark & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

Appeal of that portion of a bankruptcy court order requiring proceeds of debtor's post-confirmation lawsuit, if any, to be deposited into the court registry was DISMISSED because appellant, debtor's litigation counsel, could not be an "**aggrieved party**" unless and until the proceeds were deposited and counsel's claim thereto was denied. That portion of the bankruptcy court's order disallowing counsel's post-petition, pre-confirmation fees on the ground that counsel's employment had not been approved pursuant to **11 U.S.C. § 327** was **AFFIRMED**.

351. ***Cobra Well Testers, LLC v. Russell (In re Carlson)*, 337 B.R. 728, 2006 WL 41173, BAP No. WY-05-080 (10th Cir. BAP filed Jan. 9, 2006) (Michael, J.) (before McFeeley, C.J., & Bohanon & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *appeal dismissed*, No. 06-8010 (10th Cir. Aug. 16, 2006).**

A bankruptcy court order refusing to impose a **constructive trust** on payment proceeds in favor of purchaser from debtor that claimed debtor failed to provide all of the equipment purchased was AFFIRMED on the grounds that 1) purchaser failed to establish the existence of a "confidential relationship" between itself and debtor, which is required for imposition of a constructive trust under Wyoming law; 2) constructive trust doctrine is at odds with Bankruptcy Code distribution schemes; and bankruptcy court's refusal to grant equitable remedy did not amount to abuse of discretion.

352. ***Bryant v. JCOR Mechanical, Inc. (In re Electron Corp.)*, 336 B.R. 809 (10th Cir. BAP 2006) (McFeeley, C.J.) (before McFeeley, C.J., & Nugent & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order avoiding payment to materialman as preferential under **11 U.S.C. § 547(b)** was REVERSED on the ground that, had debtor not made payment, materialman could and would have perfected its lien on debtor's real property, the value of which was sufficient to cover all encumbrances, including materialman's claim.

353. ***Cargill, Inc. v. Nelson (In re LGX, LLC),*** **336 B.R. 601, 2006 WL 119147, BAP Nos. WO-05-008 & 009 (10th Cir. BAP filed Jan. 13, 2006) (Brown, J.) (before Clark, Brown, & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

On rehearing, a previous BAP decision was vacated, and the bankruptcy court's order approving a settlement between the trustee and a secured creditor was REMANDED for additional findings as to whether appellant unsecured creditor had standing to object to transfer of rights under a patent and, if so, whether the terms of the settlement constitute an impermissible transfer of those rights and, if so, whether the settlement could still be approved.

354. ***In re Ford*****, 336 B.R. 813 (10th Cir. BAP 2006) (McNiff, J.) (before Cornish, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah),** ***rev'd*****, 492 F.3d 1148 (10th Cir. 2007) .**

A bankruptcy court order denying exemption in proceeds of personal injury settlement because Debtor's failure to disclose the lawsuit was "blatant dishonesty" was REVERSED on the basis that the bankruptcy court's findings on Debtor's knowledge and motive were clearly erroneous.

355. ***Rocin Liquidation Estate v. Greyhound Bus Lines (In re Rocor Int'l, Inc.),*** **337 B.R. 728, 2006 WL 306404, BAP No. WO-05-087 (10th Cir. BAP filed Feb. 10, 2006) (Thurman, J.) (before Nugent, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order sanctioning adversary defendant for failure to timely comply with scheduling order by forbidding testimony of witness and presentation of direct evidence was AFFIRMED as it was not an abuse of the court's discretion under **Fed. R. Civ. Proc. 16(f)**.

356. ***Duncan v. Neal (In re Neal),*** **342 B.R. 384, 2006 WL 452340, BAP No. WO-05-029 (10th Cir. BAP filed Feb. 22, 2006) (Nugent, J.) (before McFeeley, C.J., and Nugent & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court judgment denying claims for exception to discharge under **11 U.S.C. § 523(a)(2) and (a)(4)** was AFFIRMED because homeowners failed to prove, against debtor contractor, either false statement or reliance, both of which are necessary to establish fraud under § 523(a)(2), and because their fiduciary duty claim under § 523(a)(4)

and the Oklahoma Trust Fund Statutes was limited to "lienable claims."

357. ***Russell v. Tadlock (In re Tadlock)*, 338 B.R. 436 (10th Cir. BAP 2006) (Bohanon, J.) (Clark, J., dissenting) (before Clark, Bohanon, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court's summary judgment in favor of Trustee was REVERSED. Trustee's technical abandonment of real property was not revocable on the ground that the property was discovered to be more valuable than previously believed. Revocation of abandonment in *In re Woods*, 173 F.3d 770 (10th Cir. 1999) was necessary to carry out the terms of a confirmed plan and was factually distinguishable.

358. ***In re Kester*, 339 B.R. 749 (10th Cir. BAP 2006) (Michael, J.) (before Bohanon, Michael, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *aff'd*, 493 F.3d 1208 (10th Cir. 2007).**

A bankruptcy court order denying Trustee's objection to debtors' claim of homestead exemption in property previously transferred to self-settled living revocable trusts was AFFIRMED under Kansas law, based on Kansas Supreme Court statements that equitable title supports a homestead exemption and Kansas' policy of liberal construction of its homestead provisions.

359. ***Gulf Ins. Co. v. Phoenix Corp. (In re Phoenix Corp.)*, 342 B.R. 385, 2006 WL 694290, BAP Nos. KS-05-039 & 041 (10th Cir. BAP filed Mar. 20, 2006) (Bohanon, J.) (before Bohanon, Michael, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court judgment dismissing adversary complaint filed by debtor's insurers and granting product liability plaintiffs' request for relief from stay was AFFIRMED on the basis that the insurers' complaint seeking a declaration of non-coverage was not sufficiently related to the bankruptcy case to confer subject matter jurisdiction, particularly where debtor claimed no interest in the policies and had no assets to reorganize.

360. ***Garrett v. Vaughan (In re Vaughan)*, 342 B.R. 385, 2006 WL 751388, BAP No. WO-05-028 (10th Cir. BAP filed Mar. 22, 2006) (Nugent, J.) (before McFeeley, C.J., and Nugent & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), aff'd, 233 F. App'x 783 (10th Cir. 2007).**

A bankruptcy court's summary judgment dismissing debtors' bankruptcy case was AFFIRMED based on **11 U.S.C. § 727(a)(4)**. In responding to Trustee's motion for summary judgment, debtors failed to controvert specific statements of material fact with specific citations to the record and, instead, offered narrative, self-serving statements to the effect that they relied on counsel in preparing schedules and other pleadings, all of which was insufficient to effectively controvert the Trustee's detailed statement of material facts. In any event, debtors' reliance on the advice of counsel could only inoculate them from

material misstatements if their reliance was reasonable, and debtors failed to provide a record from which reasonableness of their reliance could be determined.

361. ***Bank of Cushing v. Vaughan (In re Vaughan)*, 342 B.R. 385, 2006 WL 774665, BAP No. WO-04-039 (10th Cir. BAP filed Mar. 22, 2006) (Nugent, J.) (before McFeeley, C.J. and Nugent & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *aff'd in part, dismissed in part*, 233 F. App'x 783 (10th Cir. 2007).**

Debtors' appeal of a bankruptcy court judgment in favor of creditor bank on its request to except its debt from discharge under **11 U.S.C. § 523(a)(2)** was DISMISSED as moot due to dismissal of debtors' bankruptcy case in *Garrett v. Vaughan (In re Vaughan)*, WO-05-028 [360].

362. ***Anstine v. Centex Home Equity Co., LLC (In re Pepper)*, 339 B.R. 756 (10th Cir. BAP 2006) (Cornish, J.) (before McFeeley, C.J., and Clark & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court judgment avoiding a transfer made within 90 days of the filing of debtors' Chapter 7 petition, pursuant to **11 U.S.C. § 547(b)**, was AFFIRMED. Notwithstanding that creditor and debtors intended loan and deed of trust transaction to constitute a "contemporaneous exchange for value," under **11 U.S.C. § 547(c)**, creditor failed to establish on appeal, in part by failing to provide a trial transcript for appellate review, that the bankruptcy court's finding that the transfer was not "in fact" such an exchange was clearly erroneous. Perfection of a security instrument more than 7 months after giving debtors a loan fails to satisfy either a per se 10-day rule or a more flexible, totality of the circumstances rule, both of which have been adopted by other jurisdictions to determine whether a transfer qualifies as a contemporaneous exchange.

363. ***Colo. Judicial Dept. v. Sweeney (In re Sweeney)*, 341 B.R. 35 (10th Cir. BAP 2006) (McFeeley, C.J.) (before McFeeley, C.J., and Clark & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado), *aff'd*, 492 F.3d 1189 (10th Cir. 2007).**

A bankruptcy court order finding a restitution order, entered as part of a plea agreement in a juvenile proceeding, non-dischargeable under **11 U.S.C. § 1328(a)(3)** was REVERSED on the basis that an adjudication of juvenile delinquency is not "conviction of a crime" under either federal or Colorado law and, therefore, the requirements of § 1328(a)(3) were not satisfied. Whether one has been "convicted of a crime" within the meaning of § 1328(a)(3) is a question of federal law, and exceptions to discharge are to be narrowly construed.

364. ***In re Inv. Co. of the Sw.*, 341 B.R. 298 (10th Cir. BAP 2006) (Karlin, J.) (before Clark, Brown, & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court order confirming debtor's proposed plan over the objection of its principal creditor was REVERSED and remanded for further proceedings. The bankruptcy court's finding that the plan was "feasible" under **11 U.S.C. § 1129(a)(11)** was clearly erroneous because (1) the two-year sales/income/expense projections submitted with the plan were never amended to reflect significantly increased payments required by the confirmed plan; (2) the projections, even without amendment, showed a net operating loss for the majority of the projected quarters; (3) the testimony of debtor's president that the proposed payments could be made was insufficient to overcome debtor's contrary pre- and post-petition performance; (4) the record was devoid of evidence as to the feasibility of "balloon" payments required by the plan; and (5) a "drop-dead" clause does not create feasibility, rather it protects a creditor in the event the prediction of feasibility is wrong.

The plan also modified the creditor's rights in collateral without providing it with the "indubitable equivalent" of its claim, as required by **11 U.S.C. § 1129(b)(2)(A)(iii)**, because the plan's use of too-low release prices increased creditor's risk by changing the collateral mix securing its claim and by reducing its priority with respect to the collateral. Release prices may be used only if "their application cannot result in any reasonable possibility that a creditor will not be fully protected at all times until its claim is satisfied."

365. ***Lewis v. BNC Mortgage, Inc. (In re Lewis),*** **342 B.R. 384, 2006 WL 1308352, BAP No. KS-05-022 (10th Cir. BAP May 4, 2006) (McNiff, J.) (before Bohanon, Michael, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas),** ***aff'd,*** **247 F. App'x 998 (10th Cir. 2007).**

A bankruptcy court order dismissing debtor's adversary proceeding was AFFIRMED based on debtor's failure to present an adequate appellate argument, and the bankruptcy court's legal analysis was adopted by the appellate court.

366. ***In re Utah Aircraft Alliance,*** **342 B.R. 327 (10th Cir. BAP 2006) (Brown, J.) (before Cornish, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order denying relief from stay under **11 U.S.C. § 362(d)(1)** was AFFIRMED as it was not an abuse of discretion. Because § 362(e) requires a quick ruling on requests for relief from stay motions, such proceedings are necessarily cursory or summary in nature. Creditors seeking relief from stay bear the burden to establish sufficient "cause" to grant relief, but the ultimate determination of the validity of a creditor's claim is not a part of such proceedings and must be made in an adversary proceeding brought to determine the nature, extent, and validity of creditor's claims.

State law determines the nature of a property interest and federal law governs issues of perfection. Under Utah law, creditor's attempt to retain title to airplanes was ineffective, and its interest in the planes was limited to a security interest that it failed to perfect in accordance with federal law. Creditor's claim of inadequate protection was appropriately rejected based on rejection of its ownership interest and the finding that its security interest

was not perfected.

367. ***Andrews Davis Law Firm v. Loyd (In re S. Med. Arts Cos., Inc.)*, 343 B.R. 258 (10th Cir. BAP 2006) (Nugent, J.) (before McFeeley, C.J. and Nugent & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order approving a compromise settlement between Trustee and debtor's principal creditor was AFFIRMED as it did not amount to a clear abuse of discretion. Bankruptcy court had subject matter jurisdiction over settlement, despite it having been inadvertently filed in an adversary proceeding with a pending appeal of a prior summary judgment, because appeal issues were distinct and separate from issue of whether compromise may be reached. Proper notice was given pursuant to **Fed. R. Bankr. P. 2002 and 9019** because notice was sent to a notice matrix, as set forth in the bankruptcy court's Order Limiting Notice in the jointly administered main case. A bankruptcy court's conclusion that a compromise is fair and equitable must be accepted unless it either is completely devoid of evidentiary support or bears no rational relationship to the supportive evidence.

368. ***Korngold v. Loyd (In re So. Med. Arts Cos., Inc.)*, 343 B.R. 250 (10th Cir. BAP 2006) (McFeeley, C.J.) (before McFeeley, C.J., and Nugent & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *appeal dismissed*, No. 06-6209(10th Cir. August 25, 2006).**

A bankruptcy court order holding that creditor, whose claims had been disallowed, lacked standing to object to settlement was AFFIRMED because creditor had no distribution interest in the estate and was not otherwise adversely affected by the settlement.

369. ***Woody v. U.S. Dept. of Justice (In re Woody)*, 345 B.R. 246 (10th Cir. BAP 2006) (Bohanon, J.) (before Bohanon, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas) *rev'd*, 494 F.3d 939 (10th Cir. 2007).**

A bankruptcy court order discharging debtor's student loans pursuant to **11 U.S.C. § 523(a)(8)** and **42 U.S.C. § 292f(g)** was AFFIRMED because bankruptcy court applied the correct test and made factual findings in support of its determinations that 1) repayment of debtor's § 523(a) loan would impose undue hardship, and 2) non-discharge of debtor's § 292f(g) loan would be unconscionable.

370. ***In re Rubesh*, 347 B.R. 115, 2006 WL 1867678, BAP No. WY-06-007 (10th Cir. BAP filed July 6, 2006) (Cornish, J.) (before Cornish, Michael, & Nugent) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court order compelling debtor's turnover of estate assets, despite debtor's claim that the assets were of inconsequential value under **11 U.S.C. § 542(a)**, was AFFIRMED because debtor's contention that assets were over-encumbered by IRS lien

was not a valid defense to turnover of assets in which debtor has an interest and has the power to surrender.

371. ***Miller v. Bill and Carolyn Ltd. P'ship (In re Baldwin)*, 2006 WL 2034217, BAP No. EO-05-114 (10th Cir. BAP filed July 11, 2006) (Clark, J.) (before Clark, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma). Appeal filed Aug. 8, 2006 (10th Cir. Case No. 06-7083).**

That portion of a bankruptcy court order holding debtor's interest in a limited family partnership to be property of her estate was AFFIRMED, while the portion that ordered dissolution of the partnership pursuant to Oklahoma law was REVERSED. The bankruptcy court correctly held that debtor's rights in the partnership became a part of her estate upon filing of the petition, and that the trustee steps into debtor's shoes with respect to those interests. However, the bankruptcy court erroneously dissolved under state law allowing dissolution where it is "not reasonably practicable" to carry on the partnership's business since, despite the general partner's reluctance to deal with the trustee as a partner, the partnership's purposes of removing assets from general partner's estate and preserving them for the limited partner's benefit were still being served.

372. ***In re Polimino*, 345 B.R. 708 (10th Cir. BAP 2006) (Cornish, J.) (before Clark, Bohanon, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court order denying debtors' claimed exemption in the proceeds of their pre-petition refinancing of their home was AFFIRMED, since the Colorado statute granting the exemption specifies that the proceeds must be from a "sale" of the property and a refinance is not a sale.

373. ***Culley v. Castleberry (In re Culley)*, 347 B.R. 115, 2006 WL 2091199, BAP No. NM-05-105 (10th Cir. BAP filed July 24, 2006) (Nugent, J.) (before Cornish, Nugent, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**
A bankruptcy court order awarding debtor actual and punitive damages for former spouse's willful violation of discharge order was AFFIRMED. Under **11 U.S.C. § 523(c)**, bankruptcy court had exclusive jurisdiction to determine dischargeability of debts, and defendant's decision to seek recovery of pre-petition debt in state court, post-discharge, was a willful violation of **11 U.S.C. § 524(a)(2)** that justified the bankruptcy court's award of punitive damages.

374. ***Salazar v. McCormick (In re Crestview Funeral Home, Inc.)*, 347 B.R. 115, 2006 WL 2091200, NM-05-059 (10th Cir. BAP July 26, 2006) (Thurman, J.) (before Cornish, Nugent, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court order denying motion by debtor's former president for **Fed. R. Civ. P.**

60(b)(1), (2), and (3), relief was AFFIRMED since plaintiff failed to show denial of relief was an abuse of discretion.

375. ***Morris v. St. John Nat'l Bank (In re Haberman)*, 347 B.R. 411 (10th Cir. BAP 2006) (Cornish, J.) (before Cornish, Brown, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *aff'd*, 516 F.3d 1207 (10th Cir. 2008).**

A bankruptcy court order in a lien avoidance action denying trustee's motion to recover debtors' post-petition payments on an unperfected lien that were in excess of the value of the collateral on the date the petition was filed was AFFIRMED**.** When trustee avoided lien, pursuant to **11 U.S.C. § 551**, he obtained only the secured portion of the debt, which is equal to the value of the collateral securing the debt, not the debt itself.

376. ***In re Amerivision Commc'ns, Inc.*, 349 B.R. 718 (10th Cir. BAP 2006) (McNiff, J.) (before Clark, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court's order that notice of rejection of an executory contract between the debtor and the appellant in accordance with **Fed. R. Bankr. P. 6006** was adequate under the circumstances was AFFIRMED. In this case, the confirmed plan deemed all non-assumed executory contracts as rejected, and the plan's proponents had also filed a Notice of Intent listing other executory contracts that would be assumed upon plan confirmation.

377. ***Connolly v. Fiber Instrument Sales, Inc. (In re W. Integrated Networks, LLC)*, 350 B.R. 628, 2006 WL 2460702, CO-06-021 (10th Cir. BAP Aug. 25, 2006) (Michael, J.) (before Bohanon, Michael, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's order in a preference avoidance action rejecting the notion that the unrebutted presumption of a debtor's insolvency was sufficient to establish that a creditor received more through payment in full of its invoices than it would have received in a Chapter 7 liquidation was REVERSED. Trustee was entitled to rely on the presumption of insolvency under **11 U.S.C. § 547(f)** for purposes of **11 U.S.C. § 547(b)(5)**.

378. ***In re Taumoepeau*, 350 B.R. 628, 2006 WL 2473440, BAP No. UT-05-102 (10th Cir. BAP filed Aug. 29, 2006) (McNiff, J.) (before Michael, McNiff, & Jackson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *aff'd*, 523 F.3d 1213 (10th Cir. 2008).**

A bankruptcy court order granting relief from stay based on parties' stipulated settlement of a post-petition trust deed arrearage was ***res judicata*** as to the issues resolved therein and was not superceded by a subsequent confirmation order because the post-petition arrearage was not litigated at the confirmation hearing and was not addressed in either debtors'

modified Chapter 13 plan or the confirmation order. Accordingly, the stay order was unaffected by the confirmation order, and the bankruptcy court's judgment denying debtors' challenges to the stay order was AFFIRMED.

379. ***Strong v. W. United Life Assurance Co. (In re Tri-Valley Distrib., Inc.)*, 350 B.R. 628, 2006 WL 2583247, BAP No. UT-05-119 (10th Cir. BAP filed Sept. 8, 2006) (Michael, J.) (before Michael, McNiff, & Jackson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah). Appeal filed Nov. 9, 2006 (10th Cir. Case Nos. 06-4279, 06-4280).**

A bankruptcy court order retaining jurisdiction over one claim against an insurer in state receivership and abstaining from consideration of others, based on application of the **McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015**, was AFFIRMED on the ground that, although the McCarran-Ferguson Act was inapplicable, abstention from consideration of primarily state law claims was not an abuse of discretion.

380. ***In re Native Am. Sys., Inc.*, 351 B.R. 135 (10th Cir. BAP 2006) (Thurman, J.) (before Bohanon, Cornish, and Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court order treating debtor's payments for technical service contracts that it resold to its customers as administrative expenses under **11 U.S.C. § 503(b)** was AFFIRMED because debtor benefitted from creditor's ability and availability to provide services to its customers throughout the term of the contracts, whether or not debtor's customers actually requested such services.

381. ***In re Kuhnel*, 346 B.R. 528 (10th Cir. BAP 2006) (Nugent, J.) (Michael, J., dissenting) (before Bohanon, Michael, & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *rev'd*, 495 F.3d 1177 (10th Cir. 2007).**

A bankruptcy court order sustaining trustee's objection to debtor's claimed exemption in vehicle on which debtor had voluntarily granted a purchase money security interest that creditor failed to perfect was REVERSED because trustee did not "recover" the property where creditor voluntarily released its lien, making **11 U.S.C. § 522(g)** inapplicable and, therefore, trustee was barred from objecting to debtor's claimed exemption by the 30-day time limit of **Rule 4003(b), Fed. R. Bank. P.**

382. ***Mathai v. Warren (In re Warren)*, 350 B.R. 628, 2006 WL 2882816, BAP No. UT-05-025 (10th Cir. BAP filed Oct. 11, 2006) (Jackson, J.) (before Michael, McNiff, & Jackson, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *aff'd*, 512 F.3d 1241 (10th Cir. 2008).**

A bankruptcy court order denying debtors' discharge pursuant to **11 U.S.C. § 727(a)(4)** was AFFIRMED based on detailed findings of fact from which the bankruptcy court inferred a fraudulent intent of certified public accountant debtors from their liquidation of

assets, and use of the proceeds to purchase exempt property and to pre-pay living expenses, immediately prior to the filing of their petition, along with their failures to disclose pre-petition transactions and misrepresentation of asset values.

383. ***H&E Equip. v. Russell (In re Carlson)*, 356 B.R. 787, 2006 WL 3193437, BAP No. WY-06-070 (10th Cir. BAP filed Nov. 6, 2006) (Bohanon, J.) (before Bohanon, Michael, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming), *appeal dismissed*, No. 06-8156 (10th Cir. Feb. 15, 2007).**

Summary judgment in favor of trustee in a preference action pursuant to **11 U.S.C. § 547(b)** was AFFIRMED on the basis that appellant failed to provide a transcript of the hearing at which the court stated its legal reasoning and, therefore, appellate court was without a sufficient record upon which to base a meaningful review.

384. ***Columbia State Bank, N.A. v. Daviscourt (In re Daviscourt)*, 353 B.R. 674 (10th Cir. BAP 2006) (Thurman, J.) (before McFeeley, C.J., and Thurman & Somers, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court judgment finding creditor's line of credit debt non-dischargeable as to debtor husband and partially non-dischargeable as to debtor wife was AFFIRMED. Bankruptcy court did not abuse its discretion by allowing amendment of the complaint to expand creditor's **11 U.S.C. § 523(a)(2)** claim after the pleading amendment deadline in the scheduling order, and the amendment related back to the original complaint because debtors had notice of the nature of creditor's case. The bankruptcy court's misapplication of a "justifiable"reliance standard to claims under **11 U.S.C. § 523(a)(2)(B),** which requires "reasonable" reliance, was harmless since the record was sufficient to establish that creditor justifiably relied on numerous misrepresentations within the scope of **11 U.S.C. § 523(a)(2)(A)**. Finally, creditor's evidence was insufficient to impose liability on debtor wife for her husband's misrepresentations under agency principles, even if such principles are applicable to § 523(a) claims.

385. ***Sutter v. Bryant (In re Sutter)*, 356 B.R. 787, 2006 WL 3253940, BAP No. WO-06-037 (10th Cir. BAP filed Nov. 9, 2006) (Brown, J.) (before McFeeley, C.J., and Clark & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court's determination that the debtor's interest in property that was held in a trust, which had terminated pre-filing, was property of the bankruptcy estate was AFFIRMED. This Court, construing California law and **11 U.S.C. 541(c)(2)**, determined that the trust at issue was not a **spendthrift trust**, and as such, the debtor's interest therein was property of the estate.

386. ***Cobra Well Testers, LLC. v. Carlson (In re Carlson)*, 356 B.R. 787, 2006 WL 3391508, BAP No. WY-06-027 (10th Cir. BAP filed Nov. 22, 2006) (Cornish, J.) (before Cornish, Michael, & Brown, JJ.) (Appeal from the United States Bankruptcy Court**

for the District of Wyoming).

A bankruptcy court order denying creditor's requests for denial of discharge, pursuant to **11 U.S.C. § 727(a)(2)(A), (3), (4), and (5),** and for exception of its claim to discharge, pursuant to **11 U.S.C. § 523(a)(2)(A)**, was AFFIRMED because findings that creditor failed to establish that debtor acted with actual intent to defraud creditors, failed to show that destroyed business records were material to determination of debtor's financial condition, and failed to show that any asset losses were the result of debtor's conduct, were not clearly erroneous. With respect to its § 523(a)(2)(A) claim, the findings that creditor failed to establish both the requisite fraudulent intent and that its reliance on debtor's conduct was "justifiable" were similarly supported by the record.

387. ***In re Thomas*, 356 B.R. 788, 2006 WL 3391509, BAP No. WO-06-069 (10th Cir. BAP filed Nov. 22, 2006) (McNiff, J.) (before McFeeley, C.J., and Brown & McNiff) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order dismissing debtor's Chapter 13 petition, with prejudice to re-filing for 180 days, was AFFIRMED because debtor's proposed plan was not confirmable on its face and debtor made no offer or request to correct the problems, therefore, debtor's appeal of the order granting relief from the stay was thereby rendered **moot**.

388. ***Nazar v. N. Am. Sav. Bank FSB (In re Born)*, 357 B.R. 630 (10th Cir. BAP 2006) (Michael, J.) (before Clark, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order denying trustee's request for relief was AFFIRMED because trustee, who successfully avoided creditor's lien on property, acquired only the right to that property, not to payments voluntarily made by debtor that are in excess of the property's value.

389. ***Redmond v. Lentz & Clark, P.A. (In re Wagers)*, 355 B.R. 268 (10th Cir. BAP 2006) (Thurman, J.) (before Clark, Bohanon, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas), *aff'd*, 514 F.3d 1021 (10th Cir. 2007).**

Bankruptcy court judgment allowing Chapter 7 debtor's counsel to use tax refunds, assigned to it pre-petition as a retainer, to pay post-petition attorney fees was REVERSED because **11 U.S.C. § 330(a)(1)** is inapplicable unless attorney was employed pursuant to **11 U.S.C. § 327**.

390. ***In re Briggs*, 356 B.R. 787, 2006 WL 3794347, CO-06-089 (10th Cir. BAP Dec. 27, 2006) (Thurman, J.) (before McFeeley, C.J., and Bohanon & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court order denying Chapter 13 debtor's counsel's request for payment of fees out of the confirmed plan was AFFIRMED. No hearing was required because the bankruptcy court awarded all of the fees requested and the dispute was only with respect to the method of payment. Additionally, counsel did not request a hearing in the bankruptcy court. Counsel's failure to provide a statement of fees and payments for the entire "case" precluded any finding that the bankruptcy court erroneously considered payment of pre-conversion Chapter 7 fees in connection with the Chapter 13 proceedings, and the court's conclusion that counsel's fees had already been paid in full did not amount to an abuse of discretion.

391. ***Potter v. Engel (In re Potter)*, 356 B.R. 787, 2006 WL 3825184, BAP No. NM-06-014 (10th Cir. BAP filed Dec. 27, 2006) (Cornish, J.) (before Clark, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's order denying creditor's motion to intervene in debtor's legal malpractice adversary proceeding was AFFIRMED because creditor failed to establish the elements necessary for intervention under **Fed. R. Civ. P. 24(a); Fed. R. Bankr. P. 7024**. Rather than a direct interest in the lawsuit, creditor had only a contingent interest in funds potentially recoverable by debtor's estate, and such an interest is insufficient to warrant intervention of right.

392. ***Cook v. El Llano Summit Caja del Rio, LLC (In re Potter)*, 356 B.R. 787, 2006 WL 3804567, BAP No. NM-06-019 (10th Cir. BAP filed Dec. 27, 2006) (Cornish, J.) (before Clark, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

Appeal of bankruptcy court order denying creditor's motion to intervene in a foreclosure and declaratory judgment adversary proceeding against debtor was DISMISSED as **moot** because the adversary proceeding had been remanded to state court and, therefore, appellate court could no longer grant the relief requested.

393. ***Valley Nat'l Bank v. Potter (In re Potter)*, 356 B.R. 787, 2006 WL 3825185, BAP No. NM-06-025 (10th Cir. BAP filed Dec. 27, 2006) (Cornish, J.) (before Clark, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's order denying creditor's motion to intervene in adversary proceeding was AFFIRMED because creditor failed to establish the elements necessary for intervention under **Fed. R. Civ. P. 24(a); Fed. R. Bankr. P. 7024**. Rather than a direct interest in the lawsuit, creditor had only a contingent interest in funds potentially recoverable by debtor's estate, and such an interest is insufficient to warrant intervention of right.

394. ***Cain v. Settlement Capital Corp. (In re Cain)*, 356 B.R. 787, 2007 WL 128780, BAP No.**

EO-06-053 (10th Cir. BAP filed Jan. 19, 2007) (Nugent, J.) (before McFeeley, C.J., and Nugent & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).

A bankruptcy court's orders awarding partial disbursement of funds to appellant, and limiting its recovery of attorney fees, was AFFIRMED in part, REVERSED in part, and remanded. Appellant that had purchased portions of debtor's annuity payments was entitled to the benefit of its bargain, including payments diverted by debtor pre-petition, payments made by the annuity company into the court registry post-petition, and continuing monthly payments in an amount equal to what it would have received had the debtor complied with the parties' agreement, and the bankruptcy court's award of only the diverted payments was error. Also, the bankruptcy court abused its discretion by simply reducing the **attorneys' fees** award due to the difficulty of examining redacted statements, and should have reviewed proffered unredacted time statements and given a clear explanation for its award, pursuant to **11 U.S.C. § 330(a)**.

395. ***Rinehart v. Sharp (In re Sharp)*, 361 B.R. 559 (10th Cir. BAP 2007) (McFeeley, C.J.) (before McFeeley, C.J., and Nugent & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma)**.

A bankruptcy court's order concluding that an individual was a farmer as defined in **11 U.S.C. § 101(20)** and therefore exempt from involuntary proceedings was AFFIRMED. Bankruptcy courts have employed two tests for evaluating whether an individual meets the income requirements and is a farmer as defined in 11 U.S.C. § 101(20): a strict test and a totality of the circumstances test. In this case the bankruptcy court found that the requirements of both tests were met. Next, the bankruptcy court did not err in its evidentiary rulings. First, the bankruptcy judge was not clearly erroneous when it found the farmer's testimony more credible than an expert witness's testimony. Second, the bankruptcy court did not err under **Fed. R. Civ. P. 32(a)(3)(C)** when it disallowed a witness's deposition testimony as the appellants offered no evidence that the exclusion of the deposition prejudiced them or affected their substantial rights. Third, the bankruptcy court did not err when it permitted the farmer to testify on matters on which he had taken the Fifth Amendment during his deposition.

396. ***In re DeAnda-Ramirez*, 359 B.R. 794 (10th Cir. BAP 2007) (Tallman, J.) (before Clark, Cornish, & Tallman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court's order finding that the value of debtors' vehicle was Kelly Blue Book private party value as proposed in the Chapter 13 plan was AFFIRMED because creditor failed to produce any evidence to support its objection to the plan on the ground that the appropriate value of the vehicle under **11 U.S.C. § 506(a)(2)** was Kelly Blue Book retail value.

397. ***In re Vannordstrand*, 356 B.R. 788, 2007 WL 283076, BAP No. KS-05-091 (10th Cir. BAP filed Jan. 31, 2007) (Clark, J.) (before Clark, Cornish, & Tallman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court's order granting a trustee's motion for turnover of inheritance monies received by debtor while making payments under his Chapter 13 plan was AFFIRMED on the grounds that the plan specifically provided for delayed vesting in the debtor upon discharge. Because the debtor bargained for the ability to cut off postpetition collection efforts against him for postpetition debts by retaining all property by the estate, he eliminated any argument he may have had that **11 U.S.C. § 1327(b)** modifies **11 U.S.C. § 1306(a)(1)**.

398. ***In re Adair*, 356 B.R. 787, 2007 WL 283074 BAP Appeal No. EO-06-078 (10th Cir. BAP filed January 31, 2007) (Clark, J.) (before Clark, Nugent & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Eastern Oklahoma).**

A bankruptcy court's order denying the debtor's objection to the claim filed by the Oklahoma Tax Commission for sales taxes was AFFIRMED because debtor, as president of company, was personally liable for taxes collected but not remitted even though debtor nor company was ever in possession of taxes as accounts receivables had been pledged to bank on default of loan.

399. ***Taylor v. Jasper (In re Jasper)*, 356 B.R. 787, 2007 WL 390287 (10th Cir. BAP filed February 5, 2007) (Brown, J.) (before Bohanon, Brown, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's order granting summary judgment and determining a creditor's claim to be non-dischargeable pursuant to **11 U.S.C. § 523(a)(6)** was AFFIRMED because the debtor was collaterally estopped by a Texas criminal court conviction of aggravated assault from arguing he did not cause willful and malicious injury.

400. ***Wachovia Bank, N.A. v. Morris (In re Thomas)*, 362 B.R. 478 (10th Cir. BAP 2007) (Tallman, J.) (before Clark, Cornish, & Tallman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court's judgment denying a trustee's complaint to avoid and preserve an unperfected security interest in debtors' manufactured home based on the doctrine of claim preclusion was REVERSED because the prior Kansas judicial foreclosure proceedings pertained only to the real property on which the manufactured home was located, and not the manufactured home itself as under Kansas law, it constituted personal property.

401. ***In re Riazuddin*, 363 B.R. 177 (10th Cir. BAP 2007) (Brown, J.) (before McFeeley, C.J., and Nugent & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court's order, based on **judicial estoppel,** that denied debtors' and trustee's motions to reopen Ch. 7 case was REVERSED as an abuse of discretion, because the defendant in debtors' unlisted and therefore not administered personal injury action lacked standing to object to reopening, and because the elements of judicial estoppel had not been met. It is the duty of the court to reopen a case where it appears that the estate has not been fully administered, and the debtors' failure to disclose the existence of the lawsuit could not be imputed to the trustee, whether or not it was intentional.

402. ***In re Log Furniture, Inc.*, 356 B.R. 787, 2007 WL 496784, BAP Appeal Nos. UT-06-050 & 051 (10th Cir. BAP filed February 16, 2007) (McNiff, J.) (before Nugent, McNiff, & Berger, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah), *aff'd*, 257 F. App'x 101 (10th Cir. 2007).**

A bankruptcy court's approval of trustee's settlement agreement with various creditors, which resolved several disputes, was **AFFIRMED** since it was supported by evidence submitted by the trustee that appellant failed to refute.

403. ***In re Rafter Seven Ranches LP*, 362 B.R. 25 (10th Cir. BAP 2007) (Cornish, J.) (before Cornish, Michael, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas). Appeal filed Mar. 23, 2007 (10th Cir. Case No. 07-3091).**

A bankruptcy court's order denying debtor's objection to creditor's claim was AFFIRMED because it correctly determined that under the finance leases, debtor accepted or failed to make an effective rejection of goods pursuant to **U.C.C. §§ 2A-407, 2A-509, & 2A-515.**

404. ***In re Furr's Supermarkets, Inc.*, 359 B.R. 356, 2007 WL 559766, BAP No. NM-06-099 (10th Cir. BAP filed Feb. 22, 2007) (Thurman, J.) (before Michael, Brown, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's order denying a creditor's request to treat its claim as an administrative expense because it alleged debtor had converted consigned collateral was AFFIRMED on the basis that all of creditor's contractual dealings with debtor and the consideration it supplied were tendered prepetition and therefore did not fall within **11 U.S.C. § 503(b)(1)(A)** or the fundamental fairness exception.

405. ***Telluride Asset Resolution, LLC v. Telluride Global Dev. (In re Telluride Income Growth LP),* 364 B.R. 390 (10th Cir. BAP 2007) (McFeeley, C.J.) (Somers, J., dissenting) (before McFeeley C.J., and Thurman & Somers, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

An appeal from two orders: (1) an order dismissing part of an adversary proceeding and abstaining from lifting a preliminary injunction; (2) an order remanding certain equitable breach of contract claims to the Colorado state court. The first order is AFFIRMED. An

order abstaining and remanding based on comity is immediately appealable. Under 28 U.S.C. § 1334(c)(1) a bankruptcy court may abstain from both core and non-core matters. The second order is DISMISSED. An appellate court is precluded under 28 U.S.C. § 1447(d) from reviewing an order to remand if the order is based on a lack of subject matter jurisdiction.

406. ***In re Telluride Income Growth LP*, 364 B.R. 407 (10th Cir. BAP 2007) (McFeeley, C.J.) (Before McFeeley C.J., and Thurman & Somers, JJ) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court order denying motion by debtor's limited partners to amend a judgment approving the sale of debtor's assets, pursuant to **Fed. R. Bankr. P. 9023**, to clarify the court's use of the term "beneficiaries" was **AFFIRMED** because the bankruptcy court's use of the term in its judgment was not ambiguous. Appellee's motion to dismiss the appeal as **moot** was denied because, although the appellants had not obtained a stay and the sale of assets had occurred, the remedy sought on appeal, determination of whether the bankruptcy court had erroneously adjudicated appellants' rights under certain agreements, could be granted without affecting the sale. Finally, appellants' request that the appellate court take **judicial notice** of subsequent proceedings in the bankruptcy court was granted, because judicial notice is broadly construed and the subsequent events were relevant to the issues on appeal.

407. ***In re Alexander*, 363 B.R. 917 (10th Cir. BAP 2007) (McFeeley, C.J.) (before McFeeley, C.J., and Nugent, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

An order of the bankruptcy court dismissing a debtor's Chapter 13 case is AFFIRMED. If there is an objection to confirmation on the grounds of good faith, the plan proponent has the burden of proof on the issue of whether the 11 U.S.C. § 1325(a) tests have been met and must produce some affirmative evidence of his good faith. A bankruptcy court may dismiss a case under 11 U.S.C. § 1307(c) after considering the totality of the circumstances. The bankruptcy court did not err in admitting expert witness testimony in the absence of the documents on which the witness based his testimony.

408. ***In re Scroggin*, 364 B.R. 772 (10th Cir. BAP 2007) (Cornish, J.) (before Clark, Cornish, & Tallman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court's judgment in favor of debtor for damages and sanctions resulting from creditor's willful violation of the automatic stay pursuant to **11 U.S.C. § 362(h)** was AFFIRMED because creditor recklessly disregarded debtor's rights by continuing to garnish her wages postpetition, forcing debtor to file four turnover motions and obtain a release of the garnishment from the state court.

409. ***Freelife Int'l, LLC v. Butler (In re Butler)*, 359 B.R. 356, 2007 WL 866660 BAP Appeal**

No. UT-06-077 (10th Cir. BAP filed Mar. 19, 2007) (Nugent, J.) (before Nugent, McNiff, & Berger, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).

A bankruptcy court's order denying the debtors a discharge pursuant to **11 U.S.C. § 727(a)(2)&(4**) was AFFIRMED because debtors engaged in an elaborate scheme to utilize various business entities and members of their immediate family to thwart a creditor's collection efforts.

410. ***Royal v. Jones (In re Sanford)***, **369 B.R. 609 (10th Cir. BAP 2007) (Clark, J.) (before Clark, Bohanon, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court's order finding debtor's renunciation of an interest in his father's estate within one year of filing bankruptcy did not constitute a transfer of an interest in property for purposes of avoidance under **11 U.S.C. §548(a)** was REVERSED and REMANDED for a determination of whether the disclaimer was effective under Wyoming law and therefore related back to the date of father's death.

411. ***Romero v. Gonzales (In re Gonzales)***, **368 B.R. 85, 2007 WL 1294481, BAP No. NM-06-091 (10th Cir. BAP filed May 2, 2007) (Thurman, J.) (before Bohanon, Cornish, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's judgment denying a creditor's claim that she suffered a loss of real property by virtue of debtor's wrongful conduct was AFFIRMED because although creditor was misled by debtor into deeding him the property, the debtor's misrepresentations were not the proximate cause of creditor's loss of the property.

412. ***In re Snowville Farms, LLC*, 368 B.R. 85, 2007 WL 1302154, BAP No. UT-06-034 (10th Cir. BAP filed May 4, 2007) (Berger, J.) (before Nugent, McNiff, & Berger, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court order refusing debtor's request to compel creditors to execute lien waivers that would allow debtor to obtain FSA financing was **AFFIRMED** because lack of an express lien waiver requirement in the confirmed reorganization plan left the court without any provision to enforce, and because debtor had itself breached the plan terms by failing to make required payments, and could not make the required payments even if it obtained the FSA funding. In addition, debtor failed to obtain a stay on appeal and had effectively abandoned the plan, thereby rendering the appellate court unable to enforce the plan under **11 U.S.C. § 1142.**

413. ***Busch v. Hancock (In re Busch)***, **369 B.R. 614 (10th Cir. BAP 2007) (Cornish, J.) (Berger, J., concurring in part and dissenting in part) (before Cornish, Nugent, & Berger, JJ.) (Appeal from the United States Bankruptcy Court for the District of**

Utah), *appeal dismissed*, No. 07-4160 (10th Cir. Sept. 19, 2007).

A bankruptcy court's order denying debtor's motions for relief from judgment pursuant to **Fed. R. Bankr. P. 7052 & 9024** was AFFIRMED in part, and REVERSED in part. The bankruptcy court correctly concluded that an obligation imposed by the parties' divorce decree on debtor to pay a second mortgage on the couple's marital residence was in the nature of support until the parties' child reached age 18, and therefore, nondischargeable pursuant to **11 U.S.C. § 523(a)(5)**. The bankruptcy court's award of attorney's fees to ex-wife for fees incurred in connection with nondischargeability litigation in the bankruptcy court was permissible, but its award of attorney's fees incurred in state court litigation was reversed because the fees were not reduced to judgment in state court.

414. ***Hill v. WFS Fin., Inc (In re O'Neill)***, **370 B.R. 332 (10th Cir. BAP 2007) (Nugent, J.) (before Bohanon, Cornish, & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's order holding that **U.C.C. § 9-317(e)** is a "generally applicable law" that renders perfection of a security interest in a Colorado motor vehicle retroactive and subjects the trustee's avoiding powers to such relation back under **11 U.S.C. § 546(b)(1)(A)** was REVERSED because the Colorado Certificate of Title Act renders the U.C.C. inapplicable to titled vehicle transactions.

415. ***Carl Zeiss Meditec AG v. Anstine (In re U.S. Med., Inc.)***, **370 B.R. 340 (10th Cir. BAP 2007) (Cornish, J.) (before Clark, Cornish, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado), *aff'd*, 531 F.3d 1272 (10th Cir. 2008).**

A bankruptcy court's order determining that creditor was a nonstatutory insider with respect to debtor for purposes of preferential transfers was REVERSED because creditor exercised no control or undue influence over debtor, and the transactions between the parties were conducted at arm's length.

416. ***Van Vuuren v. Berrien (In re Berrien)***, **368 B.R. 85, 2007 WL 1701679, BAP No. CO-06-107 (10th Cir. BAP filed June 13, 2007) (Clark, J.) (before Clark, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado), *aff'd*, 280 F. App'x, 762 (10th Cir. June 4, 2008).**

A bankruptcy court's order awarding monetary damages and determining them to be non-dischargeable pursuant to **11 U.S.C. § 523(a)(6)** was **AFFIRMED** because the court's findings that debtor had falsely reported that his wife had been injured in an accident caused by one of the plaintiffs in order to fraudulently obtain money from them were not clearly erroneous. Debtor's argument that none of the plaintiffs had a cause of action because he only "intended" financial harm to the one plaintiff that did not incur any financial harm was rejected.

417. ***In re Svigel***, **378 B.R. 418, 2007 WL 1747117, BAP No. WY-07-020 (10th Cir. BAP filed June 18, 2007) (Cornish, J.) (before McFeeley, C.J., and Cornish, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court's order dismissing debtor's Chapter 13 case for failure to file payment advices received within 60 days before filing her petition was REMANDED to the bankruptcy court to consider whether pay stubs containing year-to-date information that included the 60-day period met the requirements of **11 U.S.C. § 521(a)(1)(B)(iv)**.

418. ***In re Dynamic Tooling Sys., Inc.***, **378 B.R. 417, 2007 WL 1747045, BAP No. KS-06-105 (10th Cir. BAP filed June 18, 2007) (Brown, J.) (before McFeeley, C.J., and Bohanon & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas, *reported at* 349 B.R. 847 (Bankr. D. Kan. 2006)), *appeal dismissed upon parties' stipulation*, No. 07-3202 (10th Cir. Sept. 26, 2007).**

Creditor's appeals of two bankruptcy court orders regarding confirmation of another creditor's Chapter 11 plan were **DISMISSED** on the basis of equitable **mootness**. Where appellant failed to even request a stay pending appeal, and debtor's assets had been purchased, moved to another state, and incorporated into the purchaser's own business, distributions had been made to creditors, debtor's business operations had been shut down, and the purchaser had initiated adversary proceedings contemplated by the plan, the plan was "substantially consummated" pursuant to **11 U.S.C. § 1101(2)**, and the other elements of equitable mootness were satisfied.

419. ***In re Scrivner***, **370 B.R. 346 (10th Cir. BAP 2007) (Thurman, J.) (Clark, J. dissenting) (before McFeeley, C.J., and Clark & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Western Oklahoma), *rev'd*, 535 F.3d 1258 (10th Cir. 2008), *cert. denied*, 77 U.S.L.W. 3308 (2009).**

Pursuant to **11 U.S.C. § 105(a)**, a bankruptcy court's order surcharging a debtor's exempt retirement funds to collect the value of property not produced as directed by turnover order was not an abuse of discretion and was therefore AFFIRMED.

420. ***In re Star Acquisition III, LLC***, **368 B.R. 85, 2007 WL 1800623, BAP No. CO-06-129 (10th Cir. BAP filed June 21, 2007) (McNiff, J.) (before Clark, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's order dismissing a motion to enforce a "free and clear" provision of a sale order, on the grounds of lack of jurisdiction, was **REVERSED** and **REMANDED** because the **record was insufficient** to determine whether the *ad valorem* taxes at issue were incurred before or after the sale. Findings regarding the basis for the taxes were required because, if the taxes were assessed based on debtor's production of oil and gas on the property, then the sale order would be implicated and the bankruptcy court would have "arising in" jurisdiction to resolve the dispute, pursuant to **28 U.S.C. § 1334(b)**. The bankruptcy court's alternative holding that it would **abstain** under **28 U.S.C. § 1334(c)(1)**,

even if it had jurisdiction over the dispute, could not be reviewed without an adequately supported determination of jurisdiction.

421. ***Reck v. Tarbell (In re Tarbell)*, 368 B.R. 85, 2007 WL 1835511, BAP No. CO-07-007 (10th Cir. BAP filed June 27, 2007) (Thurman, J.) (before Bohanon, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

The bankruptcy court's order denying plaintiff's motion for relief from the court's prior order dismissing, for failure to prosecute, her proceeding pursuant to **11 U.S.C. § 523(a)(2)(A)**, in the debtor's Chapter 7 bankruptcy case, was AFFIRMED. Under **Fed. R. Civ. P. 60(b)**, which applies to bankruptcy proceedings under **Fed. R. Bankr. P. 9024**, relief from a dismissal order may be granted due to mistake, inadvertence, surprise, or excusable neglect. The court has substantial discretion in ruling on such motions, and relief is intended to be granted only in exceptional circumstances. Here, counsel's actions (not monitoring his mail for over a week, mailing a document to the court without a return address or sufficient postage) were simple neglect, rather than **excusable neglect**.

422. ***Tarbell v. Tarbell (In re Tarbell)*, 368 B.R. 85, 2007 WL 1835547, BAP No. CO-07-024 (10th Cir. BAP filed June 27, 2007) (Thurman, J.) (before Bohanon, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

Same issues as above case, involving same counsel, same debtor, but different plaintiff.

423. ***In re Quick*, *In re Ballard*, 371 B.R. 459 (10th Cir. BAP 2007) (Clark, J.) (before Clark, Nugent, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Northern Oklahoma), *rev'd*, 526 F.3d 634 (10th Cir. 2008).**

The bankruptcy court's order denying Chrysler's objection to debtors' plans to surrender their vehicles as full satisfaction of Chrysler's claim was AFFIRMED. Debtors purchased their vehicles within 910 days of filing Chapter 13 bankruptcies. Under **11 U.S.C. § 1325**'s "hanging paragraph," bifurcation under **11 U.S.C. § 506** is eliminated in all 910 cases. Thus, debtors' proposed surrender of vehicles is in full satisfaction of their indebtedness to Chrysler.

424. ***Case v. Hilgers (In re Hilgers)*, 371 B.R. 465 (10th Cir. BAP 2007) (Brown, J.) (before McFeeley, C.J., and Bohanon & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court's order determining debtor's one-fourth remainder interests in three different trusts were property of the estate and subject to turnover under **11 U.S.C. § 542(a)** was AFFIRMED because, under the trust agreements and the Kansas Uniform

trust Code, the trusts had terminated more than three years prior to debtor's bankruptcy filing and were required to be promptly wound up and the assets distributed to beneficiaries.

425. ***In re Lewis***, **378 B.R. 418, 2007 WL 2189343, CO-06-130 (10th Cir. BAP filed July 31, 2007) (McFeeley, C.J.) (before McFeeley, C.J., and Bohanon & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

An order of the bankruptcy court approving a compromise proposed by the Trustee and denying the debtor's motion to remove the Trustee is AFFIRMED**.** The debtor did not have standing to object to the compromise because the debtor had the burden to produce evidence that he would be pecuniarily affected by the outcome of the bankruptcy appeal and did not do so. The court correctly applied the factors articulated in *In re Kopexa Realty Venture Co.*, 213 B.R. 1020 (10th Cir. BAP 1997) in approving the compromise. Unless a debtor can claim entitlement to exempt property, a debtor does not have a right under § 522(h) to step into the trustee's shoes and exercise an avoidance power.

426. ***In re Adams***, **373 B.R. 116 (10th Cir. BAP 2007) (Bohanon, J.) (before Bohanon, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court's order confirming the debtors' Chapter 13 plan was REVERSED and **REMANDED** because the debtors' non-contingent and liquidated unsecured debts exceeded the **11 U.S.C. § 109(e)** eligibility threshold.

427. ***Gonzales v. Conagra Grocery Prods. Co. (In re Furr's Supermarkets, Inc.)***, **373 B.R. 691 (10th Cir. BAP 2007) (Michael, J.) (before Michael, Nugent, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's order avoiding preferential transfers was AFFIRMED because the trustee had standing to bring the action under **11 U.S.C. §§ 547 & 550** even though none of the recovered funds would be paid to the general unsecured creditors and the creditor was unable to establish that the payments made by debtor were in the ordinary course of business pursuant to **11 U.S.C. § 547(c).**

428. ***In re Miller***, **378 B.R. 418, 2007 WL 2332391, BAP No. KS-06-132 (10th Cir. BAP filed Aug. 16, 2007) (Bohanon, J.) (before Bohanon, Brown, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas, *reported at* 2006 WL 3627745 (Bankr. D. Kan. 2006)).**

A bankruptcy court's order allowing debtor's **attorney's fee** to be paid solely out of the pre-petition portion of debtor's tax refund was **AFFIRMED** because the refund, up to the amount of the pre-petition flat-fee, was never estate property. Moreover, the doctrine of **marshaling** was not applicable to the tax refund because it could not be divided into pre- and post-petition portions for the purpose of satisfying the requirement of two funds, and

also because marshaling is an equitable doctrine that generally is not applied to the debtor's prejudice.

429. ***In re Wilson***, **374 B.R. 251 (10th Cir. BAP 2007) (Brown, J.) (before Bohanon, Brown, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court's order determining that the "hanging paragraph" of **11 U.S.C. § 1325** prohibits "910-claims" from being considered allowed secured claims was REVERSED because the "hanging paragraph" merely prohibits bifurcation of these claims and requires that the full amount of the creditor's claim be treated as an allowed secured claim when the debtor elects to retain the vehicle.

430. ***In re Carson***, **374 B.R. 247 (10th Cir. BAP 2007) (Bohanon, J.) (before Bohanon, Brown, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas, *reported at* 2006 WL 3716094 (Bankr. D. Kan. 2006)).**

A bankruptcy court's order declining to apply the equitable doctrine of marshaling to the debtor's tax refund which had been assigned pre-petition to debtor's counsel for his flat-fee retainer was **AFFIRMED** because the trustee failed to meet his burden of proving the existence of two or more funds belonging to the debtor which is a crucial element that must be established before applying the doctrine of marshaling.

431. ***Jagow v. Grunwald (In re Allied Carriers Exch., Inc.)*, 375 B.R. 610 (10th Cir. BAP 2007) (McFeeley, C.J.) (before McFeeley, C.J., and Nugent & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's order concluding that the Appellant had received a preference under 11 U.S.C. § 547(b) is AFFIRMED**.** The record supported the bankruptcy court's finding that the debtor was insolvent under the criteria of § 547(b)(4)(B). The creditor did not establish that he met the criteria of the ordinary course of business exception in 11 U.S.C. § 547(c)(2).

432. ***Ross, Schroeder & Romatzke v. Peterson (In re Peterson)*, 378 B.R. 418, 2007 WL 2683018, BAP No. CO-07-043 (10th Cir. BAP filed Sept. 7, 2007) (McNiff, J.) (before McFeeley, C.J., and Nugent & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's order which determined that Peterson's debt to the law firm of Ross, Schroeder and Romatzke ("RSR") was dischargeable was AFFIRMED. RSR represented Peterson in divorce proceedings. In the divorce decree, Peterson was awarded earrings, a ring, and a necklace, collectively valued by the divorce court at $37,000. When Peterson filed for chapter 7 bankruptcy, she listed the earrings as valued at $200, and did not list the ring and the necklace. RSR objected to Peterson's discharge under **11 U.S.C. 727(a)(4)(A) and (a)(5)**. At trial, Peterson

testified that a jeweler had valued the earrings at only $200 because of a flaw, that she had given away the necklace, and lost the ring. Her testimony on the necklace was corroborated. Under **11 U.S.C. 727(a)(4)(A)**, a debtor is not discharged if the debtor "knowingly and fraudulently, in or in connection with the case, made a "false oath or account." Under **11 U.S.C. § 727(a)(5)**, the court "shall grant the debtor a discharge, unless the debtor has failed to explain satisfactorily . . . any loss of assets . . .. In this case, the court concluded there was no fraudulent intent, and that Peterson's explanation was credible. The BAP will not substitute its judgment for that of the district court.

433. ***Beery v. Gonzales (In re Beery)*, 378 B.R. 417, 2007 WL 2683120, BAP No. NM-07-066 (10th Cir. BAP filed Sept. 10, 2007) (Bohanon, J.) (before Bohanon, McNiff, &Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

The bankruptcy court's order granting the Trustee's motion to dismiss debtor's complaint to quiet title and to declare him the sole owner of real property was AFFIRMED. The bankruptcy court did not err in applying the **collateral estoppel doctrine** to the quiet title action**.** The bankruptcy court also correctly concluded that the automatic stay under **11 U.S.C. § 362(a)** was still in effect when the debtor filed the quiet title action. **§ 362(c)** provides that, unless relief is granted earlier by the court, a stay of an act against property of the estate expires when the property is no longer property of the estate; other stays expire at the earlier of the time that (1) the case is closed, (2) the case is dismissed, or (3) the debtor receives a discharge.

434. ***In re Rafter Seven Ranches LP*, 378 B.R. 418, 2007 WL 2694310, BAP No. KS-06-137 (10th Cir. BAP filed Sept. 12, 2007) (Brown, J.) (Thurman, J., dissenting) (before Bohanon, Brown, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court's order denying debtor's motion "to interpret" a settlement agreement was **REVERSED** and **REMANDED** on the ground that the unambiguous term "one at a time," in reference to **sales of real property** parcels to recoup debtor's unmet payment obligations, required completion of the sale process for each tract of land prior to initiating the process for the next tract.

435. ***Hamilton v. Wash. Mut. Bank FA (In re Colon*), 376 B.R. 33 (10th Cir. BAP 2007) (McNiff, J.) (before Bohanon, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas). Appeal filed October 17, 2007 (10th Cir. Case No. 07-3313).**

The bankruptcy court's order that the Trustee (Hamilton) could avoid, under **11 U.S.C. § 544(a)(1) & (3),** Washington Mutual's mortgage on debtor Colon's property because the mortgage was improperly perfected, was AFFIRMED. The mortgage, recorded under an incorrect lot number, did not provide constructive

notice to the Trustee (as a bona fide purchaser or "BFP"), because a search of the Kansas register of deeds by legal description would not reveal the mortgage. Further, the confirmation order which stated that the mortgage was avoidable by the Trustee did not violate **11 U.S.C. § 1322(b)(2).**

436. ***In re Gallagher***, **378 B.R. 418, 2007 WL 2745808, KS-07-051 (10th Cir. BAP filed Sept. 21, 2007) (Cornish, J.) (before Clark, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**
A bankruptcy court's order confirming debtor's Chapter 13 plan was REVERSED because the plan did not provide for payment of postpetition interest on a vehicle purchased by debtor within 910 days prior to filing bankruptcy. The bankruptcy court erred in interpreting the "hanging paragraph" of **11 U.S.C. § 1325.**

437. ***In re JE Livestock, Inc.***, **375 B.R. 892 (10th Cir. BAP 2007) (Nugent, J.) (before Michael, Nugent, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming),** ***appeal dismissed*****, No. 07-8084 (10th Cir. June 11, 2008).**

A bankruptcy court's order granting creditor's request to lift the automatic stay in order to proceed with foreclosure of debtor's real estate was AFFIRMED because the bankruptcy court did not abuse its discretion in determining cause existed under **11 U.S.C. § 362(d)(1)** when debtor persisted in filing a Chapter 11 plan that failed to acknowledge the court's valuation of creditor's collateral and made threats to devalue the property.

438. ***In re Derringer***, **375 B.R. 903 (10th Cir. BAP 2007) (Michael, J.) (before Clark, Michael, & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's order awarding compensatory and punitive damages to the debtor as a result of the creditor's violation of the automatic stay was AFFIRMED because the filing and mailing of a foreclosure notice within the ten day period established by **Fed. R. Bankr. P. 4003(a)(3)** did not constitute a continuation or postponement of a prepetition foreclosure action.

439. ***Gonzales v. Amplex Corp. (In re Furr's Supermarkets, Inc.)***, **378 B.R. 418, 2007 WL 2827459, BAP Nos. NM-06-109, 110, 112, 113, 114, 115, & 116 (10th Cir. BAP filed Sept. 26, 2007) (Clark, J.) (before Clark, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico),** ***appeal dismissed*****, No. 07-2258 (10th Cir. Mar. 6, 2008).**

A bankruptcy court's orders determining that disputed payments were preferential under **11 U.S.C. § 547(b)** and awarding pre- and post-judgment interest were AFFIRMED because: 1) the trustee timely served notice of it avoidance claims pursuant to **Fed. R. Civ. P. 4(m)**; 2) the amendment of trustee's complaint to add defendant was not limited by the statute of limitations set forth in **11 U.S.C. § 546(a)(1)** since it related back to date of original filing under **Fed. R. Civ. P. 15(c)(3)**; 3) the payments did not consist of creditors' own collateral

because commingled proceeds could not be adequately traced as required by **U.C.C. § 9-315**; and 4) the **11 U.S.C. § 547(c)(2)** ordinary course of business defense was not applicable as the uncontroverted evidence established that the payments were not ordinary from the debtor's perspective.

440. ***Lincoln Nat'l Life Ins. Co. v. Silver (In re Silver)***, **378 B.R. 418, 2007 WL 2915042, BAP No. NM-07-054 (10th Cir. BAP filed Oct. 2, 2007) (Nugent, J.) (before Clark, Michael, & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico)*, appeal dismissed*, No. 07-2277 (10th Cir. Feb. 29, 2008).**

A bankruptcy court's order revoking debtor's Chapter 7 discharge under **11 U.S.C. § 727(d)(2)** was AFFIRMED because moving party was a marital community creditor that had standing to bring the revocation action and without the trial record there was no way to review the bankruptcy court's determination that debtor failed to meet her burden of establishing lack of benefit to the community.

441. ***In re Union Home & Indus., Inc.***, **375 B.R. 912 (10th Cir. BAP 2007) (Brown, J.) (before Michael, Nugent, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's order denying debtor's application for entry of a final decree after a Chapter 11 plan had been confirmed was AFFIRMED on the grounds that the bankruptcy court did not abuse its discretion when it determined the case had not been fully administered for purposes of **11 U.S.C. § 350(a)** or **Fed R. Bankr. P. 3002** because final fee applications had not yet been submitted or determined.

442. ***In re Union Home & Indus., Inc.***, **376 B.R. 298 (10th Cir. BAP 2007) (before Michael, Nugent, & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

Debtor's appeal of a bankruptcy court's order which denied in part an application to employ counsel for counsel's failure to file a separate statement required by **Fed. R. Bankr. P. 2014** was DISMISSED for lack of jurisdiction because the bankruptcy court's order was not a final order under **28 U.S.C. § 158(a)(1)**, nor did it meet the requirements of the collateral order exception since the order was still capable of revision by the bankruptcy court whose final order on allowable fees would be appealable.

443. ***In re Jones*, 381 B.R. 417, 2007 WL 3268431, BAP No. WO-07-032 (10th Cir. BAP filed Nov. 6, 2007) (Nugent, J.) (before McFeeley, C.J., and Nugent & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

The bankruptcy court 's order denying the debtors' motion to reconsider its prior orders was AFFIRMED. Under **Fed. R. Civ. P. 59(e)**, a motion to reconsider should be granted if a court has misapprehended the facts, a party's position, or

controlling law, and permits the consideration of the merits of the underlying judgment. Under **Fed. R. Civ. 60(b),** a court may grant relief from judgment based on numerous criteria, including mistake, inadvertence, surprise or **excusable neglect**, and does not permit review of the underlying judgment. Both rules apply to bankruptcy proceedings via **Fed. R. Bankr. P. 9023 and 9024.** While **Fed. R. Civ. P. 60(b)(6)** has been referred to as "a grand reservoir of equitable power to do justice in a particular case," a counseled, deliberate choice with unfortunate consequences does not warrant Rule 60(b)(6) relief.

444. ***Smith v. Colo. Supreme Court (In re Smith)*, 378 B.R. 418, 2007 WL 4227255, BAP No. CO-07-028 (10th Cir. BAP filed Dec. 3, 2007) (Michael, J.) (before Clark, Michael, & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado). Appeal filed January 30, 2008 (10th Cir. Case No. 08-1030).**

A bankruptcy court's order dismissing this adversary proceeding for lack of subject matter jurisdiction over debtor's disbarment by the Colorado Supreme Court was AFFIRMED based on the *Rooker-Feldman* doctrine.

445. ***Phase One Landscapes, Inc. v. Hook (In re Smith)*, 378 B.R. 418, 2007 WL 4227256, BAP No. CO-07-029 (10th Cir. BAP filed Dec. 3, 2007) (Michael, J.) (before Clark, Michael, & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's order abstaining from hearing the breach of contract dispute between debtor and creditor which had been filed in state court prior to bankruptcy was AFFIRMED because the bankruptcy court did not abuse its discretion under **28 U.S.C. § 1334(c)**.

446. ***Rocin Liquidation Estate v. UPAC (In re Rocor, Int'l Inc.)*, 380 B.R. 567 (10th Cir. BAP 2007) (Karlin, J.) (before McFeeley, C.J., and Thurman & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Western Oklahoma).**

A bankruptcy court's order granting summary judgment in favor of defendant insurance premium financing company in a preferential transfer case brought under **11 U.S.C. § 547(b)(5)** was AFFIRMED because the company's security was in excess of debtor's remaining obligation and therefore it would not have received more in a hypothetical Chapter 7 case.

447. ***In re Lanning*, 380 B.R. 17 (10th Cir. BAP 2007) (Thurman, J.) (Before Bohanon, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas). Appeal filed January 2, 2008 (10th Cir. Case No. 08-3009).**

The bankruptcy court's order denying the Trustee's objection to the debtor's proposed plan, on the ground that it proposed to pay less than the debtor's projected

disposable income, is AFFIRMED. During the six months prior to the debtor's filing for Chapter 13 relief, she received a buy-out from her employer that resulted in a "bump" to her income, but then she was terminated. Debtor argued that her "projected disposable income" pursuant to **11 U.S.C. § 1325(b)(1)(B)** should be allowed to deviate from her "current disposable income" on Form B22C. The court correctly concluded that Chapter 13 debtors should be given the option to present documentation, similar to that required by **§ 707(b)(2)(B)(ii)** in Chapter 7 cases, to show that their disposable income figure does not accurately reflect the debtor's future ability to fund a plan.

448. ***Ries v. Sukut (In re Sukut)***, **380 B.R. 577 (10th Cir. BAP 2007) (Clark, J.) (before Clark, Michael, & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

Two bankruptcy court orders denying judgment creditors' untimely motions to reconsider prior rulings in their adversary proceeding seeking exception from discharge were DISMISSED for lack of jurisdiction because they were not final orders under **28 U.S.C. § 158(a)(1)**, nor were they properly certifiable as final pursuant to **Fed. R. Civ. P. 54(b)** which requires both finality of one or more claims in a multi-claim action and an actual and express determination that there is no just reason for delay.

449. ***In re Kirkland***, **379 B.R. 341 (10th Cir. BAP 2007)** ***rev'd*****, --- F.3d ----, 2009 WL 2021158 (10th Cir. 2009).**

A bankruptcy court's order disallowing a creditor's claim was REVERSED and REMANDED because trustee's objection to the claim was based only on the lack of documentation and set forth no grounds under **11 U.S.C. § 502(b)** and **Fed. R. Bankr. P. 3001(c)** cannot vary the terms of the statute.

450. ***Telluride Global Dev., LLC v. Bullock (In re Telluride Global Dev., LLC)***, **380 B.R. 585 (10th Cir. BAP 2007) (Michael, J.) (before McFeeley, C.J., and Michael & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

The bankruptcy court did not err in refusing to abstain from hearing this dispute in favor of state court litigation, and therefore, its order determining that limited partners who were not parties to a contract for sale and deed of trust in a real estate venture did not acquire any rights under the agreements as third party beneficiaries or by way of equitable lien was AFFIRMED.

451. ***In re Vincens***, **381 B.R. 417, 2008 WL 58246, BAP No. WY-06-096 (10th Cir. BAP filed Jan. 4, 2008) (per curiam) (before McFeeley, C.J., and Michael & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming),** ***aff'd*****, 287 F. App'x 686 (10th Cir. 2008).**

A bankruptcy court's order dismissing debtor's Chapter 11 case pursuant to **11 U.S.C.**

§ 1112(b)(3) upon the trustee's motion was AFFIRMED because debtor failed to propose a feasible plan based on objective fact and failed in any other way to move forward in his efforts to revive the business.

452. ***In re Holcomb*, 380 B.R. 813 (10th Cir. BAP 2008) (McFeeley, C.J.) (before McFeeley, C.J., and Nugent & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court order which denied the debtors' motion to determine that an automatic stay remained in effect with regard to the property of estate was REVERSED and REMANDED to the bankruptcy court. The debtors filed for Chapter 13 relief but were unable to make payments, and their case was dismissed. Over 30 days later, after the debtors found new employment, they again filed a Chapter 13 petition. The bankruptcy court followed the minority view and held that the language in **11 U.S.C. § 362(c)(3)(A),** when read in conjunction with the requirement that a stay may be extended only upon motion of the debtor within the 30 day period as stated in **11 U.S.C. § 362(c)(3)(B)**, indicated that Congress must have meant the stay to expire with regard to property of the debtor's estate, the debtor, and any property of the debtor not included in the estate. The BAP decided to follow the majority rule and held that the plain language of the phrase "with respect to the debtor" means that the stay only terminates as to the debtor and the debtor's property, not to the property of the estate.

453. ***Vectra Bank Colo., N.A. v. Winger (In re Winger)*, 381 B.R. 417, 2008 WL 154469, BAP No. CO-07-090 (10th Cir. BAP filed Jan. 17, 2008) (Thurman, J.) (before Bohanon, Cornish, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's order denying creditor's assertion of non-dischargeability of its claim under **11 U.S.C. § 523(a)(2)&(6)** was AFFIRMED because the bankruptcy court was not clearly erroneous when it determined that creditor did not provide sufficient evidence to find that debtor, as opposed to her husband, acted with the requisite fraudulent intent in carrying on a check-kiting scheme.

454. ***Sw. Fin. Servs. of Las Cruces, Inc. v. Lopez (In re Lopez)*, 381 B.R. 417, 2008 WL 189846, BAP No. NM-07-064 (10th Cir. BAP filed Jan. 23, 2008) (Cornish, J.) (before Cornish, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's summary judgment determining a debt to be nondischargeable pursuant to **11 U.S.C. § 523(a)(2)(A**) was AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings. The bankruptcy court correctly rejected debtor's defense of novation and concluded creditor had an enforceable debt, but debtor sufficiently disputed the issue of her alleged intent to deceive creditor so as to prevent summary judgment.

455. ***In re Tollefsen*, 397 B.R. 545, 2008 WL 762487, BAP No. NO-07-057 (10th Cir. BAP filed Mar. 11, 2008) (Nugent, J.) (before Nugent, Brown, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma), *aff'd*, 2009 WL 500659 (10th Cir. Mar. 2, 2009).**

A bankruptcy court's dismissal of a debtor's Chapter 13 case pursuant to **11 U.S.C.§ 1307(c)(1)** was summarily AFFIRMED on the ground that the debtor failed to provide a transcript of the bankruptcy court's oral bench ruling.

456. ***In re Miller*, 383 B.R. 767 (10th Cir. BAP 2008) (Brown, J.) (before Nugent, Brown, & Rasure, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court's decision dismissing debtor's case pursuant to **11 U.S.C. § 521(i)(1)** for debtor's failure to meet the filing requirements in § 521(a)(1)(B)(iv) was REVERSED. The decision holds that the statute's requirement that an individual debtor file certain payment advices or "other evidence of payment" may be met, in certain circumstances, by filing a paystub containing year-to-date income totals. Because the pay stubs and year-to-date income information supplied by the debtor created a very clear picture as to the amount of income debtor received in the sixty days prepetition, debtor satisfied § 521(a)(1)(B)(iv) and the automatic dismissal provision of § 521(i) was not triggered.

457. ***In re Ewing*, 2008 WL 762458, BAP No. 07-074 (10th Cir. BAP filed Mar. 24, 2008) (Rasure, J.) (before Brown, McNiff, & Rasure, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court's order denying a motion to vacate the dismissal of a converted Chapter 13 case that was urged by the former Chapter 7 trustee was VACATED and the matter was REMANDED with directions to deny the motion for lack of jurisdiction. Conversion to Chapter 13 terminated the service of the Chapter 7 trustee by operation of **11 U.S.C. § 348(e)**. Conversion also divested the Chapter 7 trustee of authority over estate property and revested property in the debtors by virtue of **11 U.S.C. §§ 1303, 1306(a), and 1306(b)**. Dismissal also revested property of the estate in the debtors pursuant to **11 U.S.C. § 349(b)(3)**. Accordingly, the Chapter 7 trustee lacked standing to request that the dismissal be vacated and the case be reconverted to a Chapter 7 in order to continue to prosecute a turnover and denial of discharge adversary proceeding commenced prior to conversion.

458. ***Milk Palace Dairy LLC v. L & N Pump (In re Milk Palace Dairy)*, 385 B.R. 765 (10th Cir. BAP 2008) (Clark, J.) (before Clark, Bohanon, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court's determination that an otherwise preferential payment fell within the parties' ordinary course of business, as set forth in **11 U.S.C. § 547(c)(2)**, and was

therefore not a **preference**, was AFFIRMED on the grounds that the creditor had established both subjective and objective ordinariness of the transaction, and the routine offering to customers of balance carry-over with interest, without more, is not a business practice that the preference statute seeks to eliminate.

459. ***Griffin v. Novastar Mortgage Inc. (In re Ramsey)*, 385 B.R. 801, 2008 WL 1815701, BAP No. KS-07-050 (10th Cir. BAP filed Apr. 9, 2008) (Boulden, J.) (before McFeeley, C.J., and McNiff & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

An appeal of a bankruptcy court's denial of a settlement motion was DISMISSED because a creditor's subsequent unilateral payoff of the Debtor's confirmed plan and the bankruptcy court's issuance of an unrevoked discharge order, which were not issues on appeal, rendered the settlement motion **moot**. The bankruptcy court's subsequent ruling avoiding the creditor's unperfected consensual mortgage lien under **11 U.S.C. § 544** was REVERSED and REMANDED with instructions to dismiss the adversary proceeding because the action was **moot** at the time the bankruptcy court issued its ruling. With the Debtor's plan having been paid off in full and an unrevoked discharge order having been entered, lien avoidance would provide no benefit to the estate under **11 U.S.C. § 551** because no creditors remained.

460. ***Victoria Fry Children's Trust v. IRS (In re Twin Lakes Real Estate, LLC)*, 391 B.R. 211, 2008 WL 1961014, BAP No. UT-07-055 (10th Cir. BAP filed May 6, 2008) (Nugent, J.) (before McFeeley, C.J., and Bohanon & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court's dismissal of an action to avoid certain tax liens on property allegedly owned by the debtor as a nominee based on lack of subject matter jurisdiction and standing was AFFIRMED; the bankruptcy court correctly determined that (1) a quiet title action involving property alleged as not belonging to the debtor does not constitute a core proceeding nor a related proceeding under **28 U.S.C. § 157(b)** and (2) appellants, shareholders of the corporate debtor, lacked standing to bring the quiet title action because their claim was strictly derivative of a claim rightly belonging to the debtor.

461. ***Francis v. Sallie Mae, Inc. (In re Francis)*, 385 B.R. 800, 2008 WL 2019594, BAP No. WY-08-015 (10th Cir. BAP filed May 6, 2008) (Michael, J.) (Before Bohanon, Cornish, & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court's order granting a student loan creditor's motion for summary judgment was AFFIRMED because the loans fell within the exception of **11 U.S.C. § 523(a)(8)** at the time they were made and thus were nondischargeable.

462. ***In re Lotspeich*, 397 B.R. 545, 2008 WL 1989758, BAP No. WO-08-016 (10th Cir. BAP**

filed May 7, 2008) (Nugent, J.) (Before Nugent, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).

A bankruptcy court's determination that a buyer of real property was a good faith purchaser under **11 U.S.C. § 363(m)** was AFFIRMED because the creditor objecting to the sale failed to secure a stay pending appeal in the bankruptcy court thereby losing the relief sought under § 363(m), reversal or modification of the sale order.

463. ***In re Seferyn*, 2008 WL 2059404, BAP No. KS-07-094 (10th Cir. BAP filed May 15, 2008) (McNiff, J.) (Before McFeeley, C.J., and McNiff & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court order denying creditor's request for summary judgment, granting the debtor's cross motion for summary judgment and denying creditor's objection to debtor's exemption was AFFIRMED pursuant to **Fed. R. Civ. P. 56(c)** made applicable by **Fed. R. Bankr. P. 7056(c)**. The creditor failed to respond to the debtor's cross motion for summary judgment or provide substantial evidence to support its objection to the exemption of the IRA pursuant to **Fed. R. Bankr. P. 4003.** The Debtor met his burden as the responding party on a summary judgment motion that the record lacked substantial evidence to support a necessary element of the creditors objection to the exemption.

464. ***In re Red Rock Rig 101, Ltd.*, 397 B.R. 545, 2008 WL 2052732, BAP No. WO-07-073 (10th Cir. BAP filed May 15, 2008) (McNiff, J.) (Before Nugent, McNiff, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy order concluding that the involuntary Chapter 7 bankruptcy was properly commenced pursuant to **11 U.S.C. §303(b) and (h)** was AFFIRMED. There was sufficient evidence to support the bankruptcy court's conclusion that three of the petitioning creditors were qualified to commence the involuntary bankruptcy; the debtor was not paying its debts as they became due and the debts due on the date the petition was filed were not subject to a bona fide dispute as to amount of liability.

465. ***Am. Gen. Fin. v. Stauffer (In re Stauffer)*, 391 B.R. 211, 2008 WL 2247088, BAP No. UT-07-045 (10th Cir. BAP filed June 3, 2008) (Brown, J.) (McNiff, J., dissenting) (Before Brown, McNiff, & Rasure, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

The bankruptcy court's determination that the debtor was not entitled to an award of costs and attorney's fees under **11 U.S.C. § 523(d)** was REVERSED and REMANDED. Although the plaintiff's complaint against debtor did not explicitly allege a nondischargeability claim under **11 U.S.C. § 523(a)(2)**, the bankruptcy

court must consider the debtor's request for costs and fees under § 523(d) if the facts outlined in the complaint or as proven at trial establish that a plaintiff is asserting a claim of nondischargeability based on fraud or a false financial statement.

466. ***In re Francisco*, 390 B.R. 700 (10th Cir. BAP 2008) (Thurman, J.) (Cornish, J., concurring) (Before Bohanon, Cornish, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico, *reported at* 386 B.R. 854 (Bankr. D. N.M. 2008)).**

A bankruptcy court's dismissal of a Chapter 13 petition for failure to comply with the credit counseling requirement of **11 U.S.C. § 109(h)(1)** was REVERSED on the ground that an individual qualifies as a debtor under § 109(h)(1) so long as he or she completes the required credit counseling between 180 days before, and the moment of, filing their petition. Section 109(h)(1) was satisfied because the debtor had obtained credit counseling on the same calendar day, but prior to, the filing of her petition.

467. ***In re Walker*, 391 B.R. 211, 2008 WL 2640442, BAP No. CO-08-018 (10th Cir. BAP filed July 7, 2008) (Bohanon, J.) (Before Bohanon, Rasure, & Cornish, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's sustainment of the Trustee's objection to Debtor's homestead exemption claim and its denial of the same was AFFIRMED on several grounds: (1) the record on appeal was insufficient for proper appellate review of the bankruptcy court's finding that Debtor intended his printed name on a deed of trust to be his signature, (2) the bankruptcy court's finding regarding intent appears amply supported and thus, not clearly erroneous and (3) the bankruptcy court properly applied the doctrine of judicial estoppel to estop Debtor from asserting inconsistent positions with respect to his homestead exemption claim.

468. ***Hook v. Manzanares (In re Hook)*, 391 B.R. 211, 2008 WL 2663370, BAP No. CO-07-102 (10th Cir. BAP filed July 8, 2008) (Nugent, J.) (Before McFeeley, C.J., and Clark & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's dismissal of Debtors' Complaint against four Colorado state court judges was AFFIRMED on grounds that the bankruptcy court lacked subject matter jurisdiction over Debtors' Complaint under the **Rooker-Feldman doctrine**, Debtors' complaint does not contain enough facts to support the requested claims for relief as required under **Fed. R. Civ. P. 12(b)(6)** and Defendants were entitled to **judicial and Eleventh Amendment immunity** and thus immune from suit under these circumstances.

469. ***Melquiades v. Hill (In re Hill)*, 390 B.R. 407 (10th Cir. BAP 2008) (Clark, J.) (Before**

McFeeley, C.J., and Clark & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).

A bankruptcy court's judgment denying claim of non-dischargeability was AFFIRMED, since plaintiff's judgment for damages against debtors resulting from a work-related injury was not a "willful and malicious injury," pursuant to **11 U.S.C. § 523(a)(6)**, where the debtors' conduct, failure to provide workers' compensation insurance, did not cause the plaintiff's physical injury. The bankruptcy court's determination that the debtors' alleged misappropriation of proceeds from the sale of their wholly-owned corporation did not constitute either "fraud while acting in a fiduciary capacity" or "embezzlement," pursuant to **11 U.S.C. § 523(a)(4)**, with respect to plaintiff, an employee and creditor of the corporation, was also affirmed.

470. ***Johnson v. Smith (In re Johnson)*, 390 B.R. 414 (10th Cir. BAP 2008) (Karlin, J.) (Before Bohanon, Brown, & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming). Appeal filed July 30, 2008 (10th Cir. Case No. 08-8052)**

A bankruptcy court's award of damages for violation of the automatic stay, rendered after the debtors' main case had been dismissed, was AFFIRMED because such an action is a core proceeding that survives dismissal of the main case. In addition, although defendant waived any objection to the determination of **attorney's fees** by a non-evidentiary hearing, the bankruptcy court's award of overnight delivery charges was REVERSED, because there was no evidence that such charges were necessary and that a less expensive means of communication was not reasonably available.

471. ***Schlueter v. State Farm Mut. Ins. Co. (In re Schlueter)*, 391 B.R. 112 (10th Cir. BAP 2008) (McFeeley, C.J.) (Before McFeeley, C.J., and Nugent & Clark, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's granting of summary judgment is AFFIRMED in part and REVERSED in part. The bankruptcy court's holding that **§ 523(a)(3)(A)** precludes the discharge of a debt if the creditor has no actual knowledge of a debtor's bankruptcy prior to the claims bar date is affirmed. The decision rejects the position taken by some bankruptcy courts that actual knowledge of a bankruptcy and thus, an ability to file a claim under § 726(a)(2)(C) prior to the distribution of property of the estate imposes a duty on creditors that overrides the plain language of § 523(a)(3)(A). The bankruptcy court's finding that the debtor had provided no evidence that she had no knowledge of the creditor's claim is reversed on the grounds that there was evidence in the record that put that issue in controversy.

472. ***In re Pearson*, 390 B.R. 706 (10th Cir. BAP 2008) (McFeeley, C.J.) (Thurman, J., concurring) (Before McFeeley, C.J., and Bohanon, & Thurman, JJ.) (Appeal from the**

United States Bankruptcy Court for the District of Wyoming).

A bankruptcy court's judgment confirming a debtor's plan is REVERSED and REMANDED. A debtor who has successfully confirmed a plan has **standing** as a person aggrieved to appeal an interlocutory order that has merged into the final order when the debtor is pecuniarily affected by being obligated to amend the plan in order to obtain confirmation with provisions that the debtor believes are erroneous. The means test delineated in **§ 707(b)(2)(A)(ii)(I)** allows a debtor to take the full vehicle ownership/lease expense deduction even when the debtor's vehicle is unencumbered by lease or secured payments at the time of the bankruptcy filing.

473. ***Soutsos v. Johns (In re Johns)***, **397 B.R. 544, 2008 WL 3200096, BAP No. CO-08-014 (10th Cir. BAP filed Aug. 8, 2008) (Cornish, J.) (Bohanon, J., concurring) (Before Bohanon, Cornish, & Rasure, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's nondischargeable judgment of $16,768.75 against debtor pursuant to **11 U.S.C. § 523(a)(6)** was AFFIRMED because debtor-appellant failed to provide an adequate record for meaningful appellate review.

474. ***Smith v. Colorado Dept. of Revenue (In re Hook)***, **397 B.R. 544, 2008 WL 3906794, BAP No. CO-07-106 (10th Cir. BAP filed Aug. 26, 2008) (Clark, J.) (before McFeeley, C.J., and Clark & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court order dismissing a Chapter 11 case "for cause," pursuant to **11 U.S.C. 1112(b)** was AFFIRMED. The bankruptcy court's determination that the debtors' failure to file a plan for over a year after their petition was filed was "undue delay" that justified dismissal was not an abuse of discretion.

475. ***In re Appleberry*, 397 B.R. 544, 2008 WL 4174062, BAP No. NM-07-113 (10th Cir. BAP filed Sept. 11, 2008) (Michael, J.) (before Michael, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's orders denying creditors' motions for stay relief and to alter or amend the order denying stay relief were REVERSED and REMANDED because the bankruptcy court made no specific findings of fact or conclusions of law either in the order or on the record as required by **Fed. R. Civ. P. 52**, and therefore, effective appellate review was rendered impossible

476. ***In re Crowder*, 397 B.R. 544, 2008 WL 4265955, BAP No. NM-07-068 (10th Cir. BAP filed Sept. 17, 2008) (Brown, J.) (before Michael, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's approval of a settlement agreement between trustee and homeowner's association which conveyed estate's interest in certain roads over objection of third party asserting easement on roads was AFFIRMED. Bankruptcy court's interpretation of agreement between trustee and third party objector as only granting a temporary right of access on roads was proper. The bankruptcy court properly applied a canon of contract construction, construing the agreement against its drafter. Alternatively, if the agreement had intended to convey a permanent easement, it was not enforceable because the parties had not complied with **11 U.S.C. § 363's** "notice and a hearing" requirement for a transfer of an estate asset outside the ordinary course of business.

477. ***In re Crowder*, 397 B.R. 544, 2008 WL 4335958, BAP No. NM-08-017 (10th Cir. BAP filed Sept. 24, 2008) (McNiff, J.) (before Michael, Brown, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's partial denial of the creditor's claim, and subsequent review under **Fed. R. Civ. P. 60(b)**, was not an abuse of discretion and was AFFIRMED on the grounds that the court was not left with the definite and firm conviction that the bankruptcy court made clear errors of judgment or fact in considering the evidence or testimony. Nor does it appear that the bankruptcy court exceeded the bounds of permissible choices in considering the facts and circumstances.

478. ***Melnor, Inc. v. Corey (In re Corey)*, 394 B.R. 519 (10th Cir. BAP 2008) (Rasure, J.) (before Thurman, Rasure, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's determination that the debtor was precluded in a **Section 523(a)(2)** proceeding from denying that a creditor's claim was procured by fraud because a federal district court had already entered a judgment by default against the debtor on the fraud claim was AFFIRMED. The default judgment was given **collateral estoppel** effect even though the issue of fraud was not "actually litigated" to its conclusion because the judgment was entered as a sanction for obstreperous litigation tactics rather than for simply failing to appear and defend.

479. ***In re Thomas*, 397 B.R. 545, 2008 WL 4570267, BAP No. WO-08-036 (10th Cir. BAP filed Oct. 14, 2008) (Cornish, J.) (before McFeeley, C.J., and Brown & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma), *corrected opinion filed* Dec. 11, 2008.**

A bankruptcy court's award of attorney's fees as a sanction following remand of adversary proceeding to state court was AFFIRMED on the basis that the bankruptcy court retained jurisdiction to award attorneys' fees after remand as a sanction for a litigant's frivolous actions in connection with removed proceeding. Bankruptcy court appropriately awarded sanctions under its inherent authority afforded by **11 U.S.C. § 105(a)**.

480. ***In re Padilla***, **397 B.R. 545, 2008 WL 4570268, BAP No. CO-08-044 (10th Cir. BAP filed Oct. 14, 2008) (Cornish, J.) (before McFeeley, C.J., and Cornish & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's order granting creditor's motion for stay relief brought pursuant to **11 U.S.C. § 362(d)** was AFFIRMED because it was not abuse of discretion to grant stay relief without an evidentiary hearing when debtor failed to timely respond to creditor's motion as required by local bankruptcy rules. Pursuant to **11 U.S.C. § 102(1)(A)**, "after notice and a hearing" does not mean an actual hearing.

481. ***Bainbridge v. Soehngen (In re Soehngen),*** **397 B.R. 545, 2008 WL 4630555, BAP No. CO-07-100 (10th Cir. BAP filed Oct. 15, 2008) (Karlin, J.) (before McFeeley, C.J., and Nugent & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's default judgment against debtor was AFFIRMED because it was not an abuse of discretion to require debtor to properly defend an adversary proceeding and, although debtor claimed on appeal that the omissions leading to the default were caused by her counsel's illness, that claim was never made in the bankruptcy court, and no evidence connecting counsel's current illness to the omissions was submitted, even on appeal.

482. ***Chiquito v. Livingston (In re Livingston),*** **397 B.R. 544, 2008 WL 4642979, BAP No. CO-08-047 (10th Cir. BAP filed Oct. 21, 2008) (Bohanon, J.) (before Bohanon, Nugent, & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's summary judgment order that the debt Debtor owes from a state court default judgment entered in an action brought by a presumptive father seeking indemnity from the biological father based on fraud, is a nondischargeable domestic support order ("DSO") pursuant to **11 U.S.C. § 523(a)(5)** is REVERSED on the ground that Creditor failed to establish a crucial element of a DSO, that it involves a debt in support of or for the benefit of a child of the debtor. The bankruptcy court erred in finding the child was a "child of the debtor" because (1) a Colorado court had conclusively determined that Creditor was the child's father and could not disestablish his paternity; thus as a matter of law, the bankruptcy court was precluded from making such a finding; (2) the parties' stipulations as to the child's paternity was inconclusive; and (3) the bankruptcy court erroneously gave collateral effect to comments made by a state court in the "paternity fraud" action.

483. ***In re Graves,*** **396 B.R. 70 (10th Cir. BAP 2008) (Thurman, J.) (before Bohanon, Michael, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court order denying Chapter 7 trustee's motion to compel turnover, pursuant to **11 U.S.C. § 542(a)**, of debtors' **tax refund** that they applied, pre-petition, to pre-payment of their next year's federal income tax liability was **AFFIRMED**. Turnover is appropriate only where the target has, during the case, "possession custody, or control" of estate property, and that property is something that the trustee can "use, sell, or lease." Turnover may not ordinarily be used to compel debtors to produce something in which they hold only a contingent, reversionary interest.

484. ***Johnson v. Riebesell (In re Riebesell),*** **2009 WL 140976, BAP No. CO-08-052 (10th Cir. BAP filed Jan. 21, 2009) (Cornish, J.) (Bohanon, J. concurring) (before Bohanon, Cornish, & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

The bankruptcy court's money judgment against debtor and its determination that it was nondischargeable in part pursuant to **11 U.S.C. § 523(a)(2)(A)** was AFFIRMED because its findings that: 1) an attorney client-relationship existed giving rise to an ethical duty make certain disclosures in connection with a loan transaction, 2) the debtor intended to deceive the creditor, and 3) creditor established justifiable reliance, were not clearly erroneous.

485. ***In re McCaull*****, 309 F. App'x 230, 2009 WL 185469, BAP No. WO-08-084 (10th Cir. BAP filed Jan. 26, 2009) (Nugent, J.) (before McFeeley, C.J., and Nugent & Brown, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

A bankruptcy court's denial of Debtor's motion to reconsider its attorney's fees award to the trustee's attorney was AFFIRMED on grounds the bankruptcy court properly interpreted and applied Oklahoma's attorney's fees limitation statute.

486. ***In re Daniel*****, 407 B.R. 443, 2009 WL 382434, BAP No. CO-08-068 (10th Cir. BAP filed Feb. 17, 2009) (Michael, J.) (before Michael, Nugent, & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

The bankruptcy court's dismissal of debtor's Chapter 13 case for failure to timely file payment advices as required by **11 U.S.C. § 521(a)(1)(B)(iv)** was AFFIRMED because there was nothing in the record to contradict the bankruptcy court's finding that the requirement was not complied with on a timely basis.

487. ***In re Rogers*****, 401 B.R. 490 (10th Cir. BAP 2009) (McFeeley, C.J.) (before McFeeley, C.J., and Nugent & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma).**

A bankruptcy court's award of attorney's fees and costs wherein the court reduced the amount of attorney's fees and costs under **11 U.S.C. § 330** was AFFIRMED on

the grounds that the bankruptcy court used the appropriate standard of review and made factual findings regarding the entries and expenses contained in Debtors' fee application. The filing of a fee application precludes the award a presumptive or standard fee.

488. ***In re Smith*, 401 B.R. 487 (10th Cir. BAP 2009) (McFeeley, C.J.) (before McFeeley, C.J., and Nugent & McNiff, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

A bankruptcy court's disallowance of debtor's claim of exemption in tax refunds representing overpayment of taxes on otherwise exempt income was REVERSED based on the Utah Supreme Court's interpretation of **Utah Code Ann. § 78B-5-507 (2008)** that the funds could be reasonably traced.

489. ***Frazier v. Schafer (In re Schafer)*, 407 B.R. 443, 2009 WL 504599, BAP No. UT-07-114 (10th Cir. BAP filed Mar. 2, 2009) (Michael, J.) (before Cornish, C.J., and McFeeley & Michael, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

The bankruptcy court's determination that a money judgment against debtor was nondischargeable pursuant to **11 U.S.C. § 523(a)(2)(A)** was AFFIRMED because: 1) the expired state statute of limitations period for fraud did not preclude the creditor's nondischargeability proceeding; and 2) the bankruptcy court's finding that debtor intended to deceive creditor was not clearly erroneous.

490. ***In re Stephens*, 402 B.R. 1 (10th Cir. BAP 2009) (Karlin, J.) (before Brown, Thurman, & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

Bankruptcy court judgment finding that Iowa homestead law could not be applied to property outside of the state of Iowa, and therefore was not applicable to proceeds from the sale of debtor's Iowa homestead that were currently in debtor's new state of residence, Oklahoma, was REVERSED because Iowa's current **homestead** statute has not been restricted to in-state property. The decision adopts the view that, in the absence of either statutory or case law limits on territoriality, state exemption statutes apply extraterritorially, and rejects the view that **11 U.S.C. § 522(b)(3)** is a federal choice of law provision that preempts state territorial limitations. The case was REMANDED for consideration of the availability of Iowa's homestead exemption to the debtor's proceeds.

491. ***Bucl v. Hampton (In re Hampton)*, 407 B.R. 443, 2009 WL 612491, BAP No. KS-08-067 (10th Cir. BAP filed Mar. 11, 2009) (Brown, J.) (before Michael, Brown, & Starzynski, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

The bankruptcy court's order denying the plaintiffs' claims for **nondischargeability** under 11 U.S.C. § 523(a)(2)(A), (a)(4) and (a)(6), was AFFIRMED. With respect to the **§ 523(a)(2)(A)** claim, the court's findings that plaintiffs failed to establish the requisite fraudulent intent and that their reliance on debtor's conduct was justifiable were supported by the record. Denial of the **§ 523(a)(4)** claim was appropriate because plaintiffs failed to establish that debtor owed a fiduciary duty to them. On the **§ 523(a)(6)** claim, the court's findings that plaintiffs failed to demonstrate a willful act or malicious injury by debtor were also supported by the record.

492. ***In re Matney*, 407 B.R. 443, 2009 WL 613139, BAP No. CO-08-058 (10th Cir. BAP filed Mar. 11, 2009) (Michael, J.) (Rasure, J., concurring) (before Cornish, C.J., and Michael & Rasure, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

The bankruptcy court's orders on attorney's fee application and denying reconsideration of the same were AFFIRMED because on appeal, the appellant did not demonstrate the bankruptcy court abused its discretion in admitting the trustee's testimony on the reasonableness of **attorney's fees** as expert testimony, or in disallowing requested fees related to a dischargeability adversary proceeding brought by the debtor with respect to federal taxes.

493. ***In re Picht*, 403 B.R. 707 (10th Cir. BAP 2009) (Michael, J.) (before Michael, Brown, & Starzynski, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

The bankruptcy court's order confirming a Chapter 13 plan was REVERSED and REMANDED so that findings of fact and conclusions of law could be entered in accordance with **Federal Rule of Civil Procedure 52** because a bankruptcy court does not have jurisdiction to enter a memorandum opinion explaining its ruling that has already been appealed.

494. ***Hepner v. Perry (In re Kleinhans)*, 2009 WL 1426780, BAP No. CO-08-056 (10th Cir. BAP filed May 22, 2009) (Karlin, J.) (before Nugent, Thurman, & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

Defendant's appeal of a bankruptcy court order dismissing his counterclaims in an avoidance action was DISMISSED as it was not a final order for purposes of appeal, was not certified pursuant to **Fed. R. Civ. P. 54(b)** and **Fed. R. Bankr. P. 7054**, and was not appropriate for interlocutory appeal.

495. ***Snyder v. Schlesselman (In re Snyder)*, 421 B.R. 602, 2009 WL 1649155, BAP No. CO-08-101 (10th Cir. BAP filed June 11, 2009) (Michael, J.) (Before Cornish, C.J., and Michael & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado), *aff'd*, No. 09-1308, 2009 WL 4049139 (10th Cir. Nov. 24, 2009).**

The unpublished opinion AFFIRMS the bankruptcy court's money judgment against debtor and its determination that said money judgment was nondischargeable pursuant to **11 U.S.C. § 523(a)(2)(A)**. The bankruptcy court's finding that creditor justifiably relied on debtor's nondisclosure that she was currently in bankruptcy was not clearly erroneous.

496. ***Wilson v. United States (In re Wilson)*, 407 B.R. 405 (10th Cir. BAP 2009) (Nugent, J.) (before Nugent, Thurman, & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

The opinion REVERSES the bankruptcy court's summary judgment order holding that **tax penalties** assessed against the debtor for filing frivolous returns under 26 U.S.C. 6702 are dischargeable under **11 U.S.C. 523(a)(7)(B)**. The act of filing the frivolous return constitutes the event or transaction under **523(a)(7)(B)**, rather than the failure to file timely returns. Thus, tax penalties for frivolous filings within 3 years of the petition date for tax years beyond the lookback period are nondischargeable.

497. ***In re Bryan*, 407 B.R. 410, (10th Cir. BAP 2009) (Thurman, J.) (before Nugent, Thurman, & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court order denying debtor's objection to a claim was AFFIRMED because the bankruptcy court properly held that debtor was not entitled to direct creditor's **application of funds** to a particular debt, both because debtor owed only one debt to creditor, although his wholly-owned corporation owed two, and because the funds were proceeds of a settlement with third-party interest holders in the corporation's property, rather than a voluntary payment by the debtor. Therefore, pursuant to Colorado law, equity requires that the proceeds be applied in such a way as to maximize creditor's return, which in this case was to a debt owed solely by the corporation, rather than to a debt owed jointly by debtor and the corporation.

498. ***Mallon v. Keenan (In re Keenan)*, 2009 WL 1743999, BAP No. NM-08-089 (10th Cir. BAP filed June 22, 2009) (Thurman, J.) (before Thurman, Rasure, & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court order confirming debtors' amended plan over creditor's objection was AFFIRMED on the ground that the plan payments were sufficient to render the court's additional deductions from its previously determined hypothetical liquidation value of the estate, pursuant to the best interests of creditors test in **11 U.S.C. § 1325(a)(4)**, irrelevant.

499. ***In re Bremer*, 408 B.R. 355 (10th Cir. BAP 2009) (Nugent, J.) (before Nugent, Thurman, & Karlin, JJ.) (Appeal from the United State Bankruptcy Court for the District of Colorado).**

The decision for these appeals, AFFIRMS the bankruptcy court's order denying the Trustee's demands for money judgments for the value of motor vehicle liens he avoided

under **11 U.S.C. § 550(a)**. The Panel rejected the Trustee's argument that he is entitled to recover the value of the liens pursuant to the Tenth Circuit's *In re Haberman* case, concluding that the bankruptcy court did not err as a matter of law or abuse its discretion in denying the Trustee's **§ 550(a)** value claim.

500. ***In re Sun 'N Fun Waterpark, LLC*, 408 B.R. 361 (10th Cir. BAP 2009) (Brown, J.) (before Brown, Rasure, & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

The Opinion REVERSES the bankruptcy court's disallowance of an over-secured creditor's claim for postpetition attorney fees, costs, and expenses under **11 U.S.C. § 506(b)**. The Opinion holds that, under Oklahoma law, the creditor who obtained a foreclosure decree prepetition, but whose collateral has not yet been sold at a sheriff's sale, did not lose its contractual rights under the mortgage to recover postpetition attorney's fees, costs, and expenses, and thus may seek recovery of those amounts to the extent the other requirements of **11 U.S.C. § 506(b)** are met. The Opinion also holds that **Fed. R. Bank. P. 2016(a)** is inapplicable to the creditor's request for prepetition fees awarded by a state court judgment and that the judgment is entitled to full faith and credit.

501. ***In re Dittmar*, 410 B.R. 71 (10th Cir. BAP 2009) (Bohanon, J.) (Brown, J., dissenting) (before Bohanon, Brown, & Weaver, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

The majority AFFIRMS the bankruptcy court's summary judgment ruling that post-petition bonus distributions were not part of the bankruptcy estate because debtors had no prepetition, contingent in the distributions but merely an **expectancy** that did not rise to the level of a legal or equitable interest. The dissent disagrees with the majority's conclusion that debtors' interests in the distributions were mere expectancies and would remand, with directions to the bankruptcy court to take evidence on the intent of the parties regarding whether there was a meeting of the minds on the meaning of the term "eligible employee" in the collective bargaining agreement.

502. ***In re Padgett*, 408 B.R. 374 (10th Cir. BAP 2009) (Michael, J.) (Starzynski, J. concurring) (before Michael, Brown, Starzynski, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

The majority decision, REVERSING, holds that the bankruptcy court erred when it allowed Debtors to bifurcate and cram down their 910 vehicle claim under **11 U.S.C. § 506** and **11 U.S.C. § 1325(a)(5)**, notwithstanding the addition of the "hanging paragraph" to § 1325(a) by BAPCPA. Pursuant to the hanging paragraph of § 1325(a), debtors are precluded from bifurcating the debt into secured and unsecured portions and cramming it down through a plan. The concurrence would reverse as well, but based upon a minimalist construction of the term "securing," as well as upon the effect of a plain language reading of the hanging paragraph.

503. ***In re Orbit Petroleum, Inc.*, 421 B.R. 602, 2009 WL 2233104, BAP No. NM-08-098 (10th Cir. BAP filed July 28, 2009) (Romero, J.) (before Thurman, Rasure, & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

The bankruptcy court did not abuse its discretion, and therefore, its order denying debtor's **Rule 60(b)** motion to set aside and vacate order directing appointment of a Chapter 11 trustee and order approving appointment of trustee are AFFIRMED. The implicit effect of these orders was to moot debtor's attempt to convert its Chapter 11 bankruptcy case to one under Chapter 7. Debtor argued it had an absolute right to convert pursuant to **11 U.S.C. § 1104(a)**, but the issue of conversion was not properly on appeal before this court because there was no effective bankruptcy court order from which to appeal.

504. ***In re Shattuck*, 411 B.R. 378 (10th Cir. BAP 2009) (Rasure, J.) (before Cornish, C.J., and Bohanon & Rasure, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

The bankruptcy court's order granting the motion to dismiss filed by a state court appointed receiver was REVERSED because the motion was filed, and evidence and argument were presented, by the receiver who was not an attorney. Pursuant to **28 U.S.C. § 1654**, an individual who is not licensed to practice in federal court may appear and represent his or her own interests pro se, but is not authorized to represent the interests of others, including an artificial entity such as an estate. Accordingly, because the receiver's motion to dismiss should have been stricken and the receiver should not have been permitted to present evidence or argument at a hearing on the motion, the dismissal order was REVERSED and the matter REMANDED to the bankruptcy court.

505. ***Loyd v. Ball (In re Dailey)*, 2009 WL 2431254, BAP No. WO-09-011 (10th Cir. BAP filed Aug. 10, 2009) (Cornish, C.J.) (before Cornish, C.J., and Rasure & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the Western District of Oklahoma).**

The bankruptcy court's order granting summary judgment in favor of trustee and avoiding creditor's mortgage lien pursuant to **11 U.S.C. § 544** was REVERSED because a hypothetical bona fide purchaser would have constructive notice of facts requiring a reasonably prudent person to investigate and determine creditor's mortgage burdened the property.

506. ***Dayton Rite Aid, LLC v. Regatta Capital, Ltd. (In re Day)*, 421 B.R. 602, 2009 WL 2606638, BAP No. NM-09-005 (10th Cir. BAP filed Aug. 26, 2009) (Bohanon, J.) (before Bohanon, Michael, and Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of New Mexico).**

A bankruptcy court's determination that Appellee has a first position claim on the proceeds from the Chapter 7 Trustee's sale of the debtor's residence is AFFIRMED. The bankruptcy

court correctly construed New Mexico's recording statutes as not requiring the issuance of a new transcript of judgment upon release of the original transcript and correctly held that Appellee's subsequent recording of the original transcript gave notice and established lien priority on the date of the second recording. Panel refused to consider issue not identified in Appellant's Statement of Issues pursuant to **Fed. R. Bankr. P. 8006.**

507. ***In re Rafter Seven Ranches L.P.*, 414 B.R. 722 (10th Cir. BAP filed Sept. 17, 2009) (Brown, J.) (before Brown, Thurman, and Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court's determination that debtor, a general partnership, was not an "individual" entitled to seek damages for alleged violations of the automatic stay under **11 U.S.C. § 362(h)** was AFFIRMED. The bankruptcy court's refusal to award damages for the same alleged stay violations under **11 U.S.C. § 105** was also AFFIRMED. Debtor's appeal of an order enforcing specific provision of a settlement agreement was DISMISSED as moot and Debtor's implicit request for vacatur of the underlying order was denied.

508. ***United States Trustee v. Garland (In re Garland)*, 417 B.R. 805, 2009 WL 2974895, BAP No. EO-08-040 (10th Cir. BAP filed Sept. 18, 2009) (Thurman, J.) (before Brown, Thurman, and Romero, JJ.) (Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma).**

A bankruptcy court judgment denying debtor's discharge pursuant to the "false oath" exception set forth in **11 U.S.C. § 727(a)(4)(A)** was AFFIRMED because the debtor, an experienced class-action lawyer, failed to disclose a **beneficial interest** in real property that was titled to one of his sons, as well as his ownership/directorship of various businesses within six years of his filing, and his signatory authority on a number of active bank accounts. The bankruptcy court's determination that the debtor's statements in his bankruptcy filings were neither truthful nor mere mistakes, as he claimed, but were instead fraudulent misstatements of material fact, was not clearly erroneous.

509. ***Geyer & Assocs. CPA's, P.C. v. Stewart (In re Stewart)*, 421 B.R. 603, 2009 WL 3724977, BAP Nos. CO-09-026 & CO-09-027 (10th Cir. BAP filed Nov. 9, 2009) (Nugent, J.) (before Nugent, Rasure, and Karlin, JJ.) (Appeals from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's judgment overruling appellant's **11 U.S.C. § 727(a)(2)** objections to the Chapter 7 discharges of debtors was AFFIRMED. The bankruptcy court's determination that the debtors' failure to list goodwill and a client list as an asset on an insider's schedules, coupled with the post-petition transfer of assets of the insider to a successor entity was not done with the requisite intent, was not clearly erroneous.

510. ***In re Miller*, 2009 WL 3863337, BAP No. KS-09-003 (10th Cir. BAP filed Nov. 19, 2009) (Romero, J.) (before Brown, Thurman, and Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

The bankruptcy court's order confirming the debtors' amended Chapter 13 plan allowed payment of the debtors' automobile debt as a secured debt for the full value of the vehicle less sums found not to comprise part of the purchase money security interest. The bankruptcy court denied that portion of the automobile lender's objection to confirmation which asserted negative equity, GAP insurance and administrative fees constituted part of the purchase money security interest. Negative equity of the debtors' trade in vehicle included as part of the purchase contract, as well as the dealer's administrative fee, constitute part of purchase money security interest, and may not be bifurcated under § 1325(a)(*). However, under KAN. STAT. ANN. § 84-9-103, cmt. 3, GAP insurance does not have the requisite "close nexus between the acquisition of collateral and the secured obligation," and thus, does not fall within the purview of "**purchase money security interest**." Accordingly, the bankruptcy court's judgment was REVERSED insofar as it denied treatment of negative equity and the dealer's administrative fee as a portion of the purchase money security interest for purposes of **11 U.S.C. § 1325**.

511. ***In re Katz*, 2009 WL 4269604, BAP No. CO-09-001 (10th Cir. BAP filed Dec. 1, 2009) (Cornish, C.J.) (before Cornish, C.J., and Michael & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's determination that Colorado's doctrine of equitable subordination defeated a Trustee's avoidance powers was REVERSED. Under **11 U.S.C. § 544(a)**, a trustee's strong arm powers arise as of the date of bankruptcy, therefore his interest takes priority over an unrecorded mortgage. **Equitable subrogation** may not be used by a creditor to defeat the Trustee's avoidance powers where the Trustee would be prejudiced by its application. Prejudice exists if a creditor who fails to timely record its interest is allowed to defeat the interest of a lien holder or bona fide purchaser who detrimentally relies on the state of recorded title.

512. ***In re Hall*, __ B.R. __, 2009 WL 4456542 (10th Cir. BAP 2009) (Romero, J.) (before Michael, Brown, and Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

As of the petition date, the Debtors owned a one acre parcel of real property. The Debtor wife and the couple's children lived in the house on the property, and the Debtor husband lived in a trailer on the property. Eighteen days post petition, the Debtor wife's father died, and she inherited personal property as a payable on death beneficiary. The Chapter 7 trustee filed an objection to the Debtor husband's claimed exemption in one-half of the real property, and a motion for turnover of the Debtor wife's inherited personal property. The bankruptcy court ordered each Debtor to choose either the house or the trailer for a claimed residential exemption, and ruled the property inherited by the Debtor wife was not subject to turnover as it was not property of the estate. On appeal, the Trustee asserted the Debtor husband should not be allowed to claim as exempt his interest in the house, as he did not occupy it on the date of filing. However, Kan Stat. § 60-2301 permits a debtor to exempt a residence occupied by him or a residence occupied by his family. Therefore, the

bankruptcy court's ruling requiring the Debtors each to choose which residence to exempt was AFFIRMED. In addition, assets acquired by the Debtor wife on her father's death did not constitute property of the estate under 11 U.S.C. §§ 541(a) (1) and (a)(5)(A) or Kansas law, so the bankruptcy court's determination that those assets were not subject to turnover was AFFIRMED.

513. ***C.W. Mining Co. v. Aquila, Inc. (In re C.W. Mining Co.)*, 2009 WL 4798264, BAP No. UT-08-102 (10th Cir. BAP filed Dec. 14, 2009) (Michael, J.) (before Michael, Brown & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

The bankruptcy court's order finding two creditors to be qualified petitioning creditors for purposes of filing an involuntary petition pursuant to **11 U.S.C. § 303(b)** was AFFIRMED because neither creditor's claim was subject to a bona fide dispute.

514. ***Standard Indus., Inc. v. Aquila Inc. (In re C.W. Mining Co.)*, 2009 WL 4894278, BAP No. UT-09-014 (10th Cir. BAP filed Dec. 18, 2009) (Michael, J.) (before Michael, Brown & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

The bankruptcy court's orders finding two creditors in contempt for violation of the automatic stay and denying them post-judgment relief from the same were AFFIRMED. The automatic stay operates during the gap period between the filing of an involuntary petition and entry of the order for relief and an interested party may commence contempt proceeding on motion.

515. ***A-Fab Eng'g v. C.W. Mining Co. (In re C.W. Mining Co.)*, 2009 WL 5175673, BAP No. UT-09-017 (10th Cir. BAP filed Dec. 30, 2009) (Brown, J.) (before Michael, Brown & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

The bankruptcy court's order denying motion to vacate an order converting involuntary Chapter 11 case to Chapter 7 on **due process** grounds was AFFIRMED. Under the particular circumstances of the case, the movant for conversion provided sufficient notice of its motion, given that the debtor had not yet filed its creditors' matrix or schedules from which the movant could obtain notice addresses.

516. ***Hatch Jacobs, LLC v. Jones (In re Kingsley Capital, Inc.)*, 423 B.R. 344 (10th Cir. BAP 2010) (Thurman, J.) (before Cornish, C.J., and Bohanon & Thurman, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

Non-debtor defendant's appeal from a bankruptcy court order awarding plaintiff the full relief sought in its complaint was DISMISSED because merits award was a final, appealable order, despite bankruptcy court's subsequent determination of fees and costs awarded pursuant to the merits judgment, and defendant failed to timely appeal. Recent

United States Supreme Court cases regarding **jurisdiction** are discussed, with the Court concluding that timely filing of a notice of appeal pursuant to **28 U.S.C. § 158(c)(2)** and **Fed. R. Bankr. P. 8002(a)** is still jurisdictional and, therefore, not subject to waiver by plaintiff's failure to raise it as a defense. The bankruptcy court's order awarding fees was AFFIRMED over defendant's objection that bankruptcy court had been without jurisdiction to enter it due to plaintiff's previous filing of a notice of withdrawal of its consent, pursuant to **28 U.S.C. § 157(c)**, to its issuance of final orders, the Court concluding that, once such consent has been given, the reference of the case may only be withdrawn by the district court upon a finding of "good cause" to do so.

517. ***C.O.P. Coal Dev. Co. v. C.W. Mining Co. (In re C.W. Mining Co.)*, 422 B.R. 476 (10th Cir. BAP 2010) (Brown, J.) (before Michael, Brown & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

The bankruptcy court's order granting Chapter 7 trustee additional time to assume or reject debtor's unexpired lease of a coal mine was AFFIRMED. Lease had not automatically terminated postpetition and was thus property of the estate and assumable under § 365.

518. ***Ryan v. Blatzer (In re Blatzer)*, 2010 WL 445062, BAP No. CO-09-24 (10th Cir. BAP filed Feb. 8, 2010) (Karlin, J.) (before Cornish, C.J., and Rasure & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's judgment of non-dischargeability of a debt, pursuant to **11 U.S.C. § 523(a)(2)(A)**, was AFFIRMED. Although plaintiff relied on a previously unstated theory of fraud at trial, that theory was tried by consent, pursuant to **Fed. R. Civ. P. 15(b)(2)**, since debtor did not contemporaneously object to the new theory at any point during the actual presentation of evidence and was neither factually nor legally surprised by the change. Moreover, the bankruptcy court's findings in support of its conclusion that plaintiff had proven the elements of fraudulent non-disclosure under § 523(a)(2)(A) were not clearly erroneous.

519. ***Torrington Livestock Cattle Co. v. Berg (In re Berg)*, 423 B.R. 671 (10th Cir. BAP 2010) (Rasure, J.) (before Rasure, Karlin & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

The bankruptcy court's judgment denying an individual Chapter 11 debtor's discharge solely on the ground that the debtor would be denied a discharge under **11 U.S.C. § 727(a)(3)** was REVERSED and REMANDED. Chapter 11 discharge is governed by **§ 1141(d)**, and all three elements of **§ 1141(d)(3)** must be established before an individual Chapter 11 debtor's discharge may be denied.

520. ***Copper v. Lemke (In re Lemke)*, 423 B.R. 917 (10th Cir. BAP 2010) (Bohanon, J.) (Cornish, C.J. and Nugent, J., specially concurring) (before Cornish, C.J., and Bohanon & Nugent, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's judgment that the debt owed to Appellant is dischargeable because he had failed to prove each element under **11 U.S.C. § 523(a)(2)** was AFFIRMED. The bankruptcy court's findings as to false representation, fraudulent intent, and justifiable reliance were not clearly erroneous. The issue of whether a creditor must prove damages in a sum certain was moot in light of Appellant's failure to prove fraud. The opinion includes a special concurrence acknowledging Judge Bohanon's outstanding service to the BAP and his retirement.

521. ***In re Eneco*, __ B.R. __, 2010 WL 744351 (10th Cir. BAP filed Mar. 2, 2010) (Michael, J.) (before Michael, Brown & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

The bankruptcy court's order dismissing a contempt motion for lack of subject matter jurisdiction was AFFIRMED because the dispute was between two creditors over property no longer belonging to the bankruptcy estate, did not arise out of the bankruptcy court's sale order regarding the property, and did not have an impact on the estate.

522. ***Love v. George Love Farming L.C. (In re George Love Farming, LLC)*, 2010 WL 813689, BAP No. UT-09-094 (10th Cir. BAP filed Mar. 9, 2010) (Romero, J.) (before Michael, Brown & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

Two debtors and a non-debtor filed a complaint in state court which was removed to the bankruptcy court. The bankruptcy court denied the plaintiffs' motion to remand and granted the defendant's motion for summary judgment against the plaintiffs. Because the dispute between the parties concerned whether the claims asserted in the removed case belonged to the Chapter 7 trustee, the matter constituted a **core proceeding**, or at least a "**related to**" proceeding, over which the bankruptcy court could exercise jurisdiction. Moreover, the bankruptcy court committed no error in ruling neither mandatory nor discretionary **abstention** applied, and that it could exercise jurisdiction over a non-debtor party whose claims were closely intertwined with those of the debtor parties and connected to the administration of the bankruptcy estate. In addition, the bankruptcy court's award of summary judgment was proper under the **law of the case** doctrine or the **collateral estoppel** doctrine. Therefore, the rulings of the bankruptcy court denying the motion to remand and granting the motion for summary judgment were AFFIRMED.

523. ***In re Bryner*, 425 B.R. 601 (10th Cir. BAP 2010) (Michael, J.) (before Michael, Brown, & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Utah).**

The bankruptcy court's order dismissing an adversary proceeding brought by the debtor alleging violations of the automatic stay was AFFIRMED because the actions taken by defendants were in a lawsuit filed against them by debtor and were in defense to debtor's continuation of the litigation.

524. ***Wodark v. Wodark (In re Wodark),*** **425 B.R. 834 (10th Cir. BAP 2010) (Nugent, J.) (before Cornish, C.J., and Nugent & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's summary judgment order holding that a marital debt to a third party assumed by the debtor wife in a separation agreement was nondischargeable as to the nondebtor former spouse under **11 U.S.C. 523(a)(15)** was AFFIRMED. The panel agreed with the bankruptcy court's analysis that even though the debt was owed to a third party, because the ex-husband was the intended beneficiary of wife's payments, and because the obligation to pay was fully enforceable by a Colorado domestic court, it fell under the purview of section 523(a)(15).

525. ***Hepner v. Kleinhans (In re Kleinhans),*** **2010 WL 1050583, BAP Appeal No. CO-09-028 (10th Cir. BAP filed March 23, 2010) (Cornish, C.J.) (before Cornish, C.J., and Karlin & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

A bankruptcy court's denial of debtor's discharge under **11 U.S.C. 727(a)(2)(B)** was summarily AFFIRMED due to debtor's failure to provide the trial transcript and exhibits in the appendix. **Fed. R. Bankr. P. 8009(b)** and **10th Cir. BAP L.R. 8006-1(a) and 8009-1(b)** require appellant to bring all documents necessary for appellate review before the court in an appendix to her brief, including the transcript: "The appendix must contain all transcripts, or portions of transcripts, necessary for the court's review." 10th Cir. BAP L.R. 8009-1(b)(5). Similarly, where an appellant argues that a finding or conclusion is unsupported by the evidence, **Fed. R. App. P. 10(2)** requires the appellant to include a transcript in the record.

526. ***Hepner v. Perry (In re Kleinhans),*** **2010 WL 1221751, BAP Appeal No. CO-09-029 (10th Cir. BAP filed March 30, 2010) (Boulden, J.) (before Cornish, C.J., and Karlin & Boulden, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

Bankruptcy court judgment granting avoidance of transfer, damages, and sanctions for non-debtor's involvement in post-petition transfer of title to estate property from debtor to him was AFFIRMED because appellant failed to support his claims that the findings of fact supporting the judgment were clearly erroneous and because the un-itemized attorneys' fees awarded were not properly challenged in the bankruptcy proceedings.

527. ***Chizzali v. Gindi (In re Gindi)*, 2010 WL 1253158, BAP Appeal No. CO-09-068 (10th Cir. BAP filed April 1, 2010) (Karlin, J.) (before Michael, Rasure, & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

Bankruptcy court's judgment 1) determining that contempt proceeding was covered by the **11 U.S.C. § 362** automatic stay; 2) denying creditor relief from stay to pursue garnishment proceedings; and 3) concluding that debtor's participation in an appeal of creditor's state court judgment against him was not barred by the automatic stay, was AFFIRMED because 1) a contempt citation that is intended to compel payment pursuant to a court order is not criminal in nature, and is therefore not exempt from stay pursuant to **§ 362(b)(1)**; 2) estate retains an interest in garnisheed funds that is protected by automatic stay, unless debtor's rights were irrevocably severed by entry of a garnishment judgment under Colorado law prior to the filing of the bankruptcy petition; and 3) in this Circuit, defense by the trustee or the debtor-in-possession of a state court action against debtor is not precluded by the automatic stay.

528. ***Morris v. Kasparek (In re Kasparek)*, 426 B.R. 332, 2010 WL 1270341 (10th Cir. BAP 2010) (Rasure, J.) (before Cornish, C.J., and Michael & Rasure, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

A bankruptcy court's determination that (1) the debtor's interest in real property held in joint tenancy with his father was excluded from the estate under **11 U.S.C. § 541(d)**, and (2) the father's purported equitable interest encumbering the debtor's interest could not be avoided by the Chapter 7 trustee under **11 U.S.C. § 544(a)(3)** because a hypothetical purchaser would have "inquiry notice" of the father's equitable interest, was REVERSED and REMANDED. Under Kansas Statutes §§ 58-2401 to 58-2408, a party may hold real estate in an **implied trust** for another under limited circumstances, but if the trust is not recorded, a bona fide purchaser takes free of the unrecorded trust. Although a party is not a bona fide purchaser if it has actual, constructive or **inquiry notice** of a claim or interest in real property, Kansas law does not impose a duty to inquire of the seller's joint tenants concerning possible unrecorded trusts or agreements between or among them.

529. ***In re Picht*, ___ B.R. _____, 2010 WL 1768238 (10th Cir. BAP 2010) (Rasure, J.) (before Thurman, Rasure, & Romero, JJ.) (Appeal from the United States Bankruptcy Court for the District of Kansas).**

An order confirming a Chapter 13 plan that required a secured creditor to release its lien against the debtors' residence upon completion of payments totaling less than the full amount of the debt was REVERSED and REMANDED. Under **11 U.S.C. § 1325(a)(5)(B)**, a plan must provide that a secured creditor retains its lien until the earlier of the entry of a Chapter 13 discharge or the full payment of the debt as determined under nonbankruptcy law. In this case, because the debtors were not eligible for a Chapter 13 discharge, and the plan did not provide for full payment of the in rem judgment against the debtors' residence, the lien release provision rendered the plan unconfirmable.

530. ***Internal Revenue Service v. Ficken (In re Ficken)*, 2010 WL 1837659, ___ B.R. _____, BAP No. CO-09-042 (10th Cir. BAP 2010) (Nugent, J.) (before Cornish, C.J., and Nugent & Karlin, JJ.) (Appeal from the United States Bankruptcy Court for the District of Colorado).**

The bankruptcy court's order granting summary judgment in favor of the debtors was AFFIRMED because the bankruptcy court correctly concluded that § 1222(a)(2)(A) strips the priority of income taxes generated by post-petition sales of farm assets and the amount of income tax stripped of priority is calculated using the marginal tax allocation method.

531. ***In re Crowson*, 2010 WL _____, ___ B.R. _____ (10th Cir. BAP 2010) (Nugent, J.) (before Cornish, C.J., and Nugent & Rasure, JJ.) (Appeal from the United States Bankruptcy Court for the District of Wyoming).**

A bankruptcy court's order determining that all of a 2008 joint federal tax refund was property of the estate was REVERSED and REMANDED for entry of a judgment consistent with this Court's conclusion. Relying on our decision *In re Kleinfeldt*, 287 B.R. 291 (10th Cir. BAP 2002) [208], the bankruptcy court concluded that the entire tax refund is property of the bankruptcy estate because only Debtor had wage withholding. The panel concluded that *Kleinfeldt* does not provide any guidance for dividing the joint refund in this case because it is limited to the very narrow situation where only one spouse has income, the joint refund is comprised of only one spouse's withheld wages, and no refundable tax credits or other types of overpayments had to be allocated between the spouses. In this case, the joint refund arose not only from Debtor's withholding, but also from three tax credits that generated refundable overpayments: the earned income credit, the additional child tax credit, and the recovery rebate credit. Finding the approach and formulas found in IRS Revenue Rulings 80-7 and 87-52 helpful, the panel concluded that the guiding principle should be to allocate tax payments and liabilities by determining what separate returns would yield and allocating accordingly. Applying this principle, the panel concluded that $2,966.99 of the joint refund was allocable to Debtor and was property of the estate, while the non-debtor spouse's share was $3,149.01.